86-107

Supreme Court, U.S.
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No. 86-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MOBILE DODGE, INC.,

Appellant,

v.

DANNY R. ALFORD,

Appellee.

On Appeal From The Supreme Court Of Alabama

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether § 12-22-72, *Code of Alabama* (1975), under which a mandatory penalty of ten percent of any money judgment is automatically imposed on an unsuccessful defendant-appellant, but which imposes no corresponding burden on an unsuccessful plaintiff-appellant, is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

2. Whether the award of approximately $124,000 in punitive damages against appellant is violative of the Excessive Fines Clause of the Eighth Amendment of the Constitution of the United States as made applicable to the States through the Due Process Clause of the Fourteenth Amendment of the Constitution, and is otherwise invalid under the Due Process Clause of the Fourteenth Amendment because it is grossly disproportionate to the wrong sought to be punished and equally out of scale with penalties prescribed by the Alabama legislature for analogous criminal conduct.*

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* Appellant, Mobile Dodge, Inc., is a closely held Delaware corporation which has no parent, affiliate or non-wholly owned subsidiary for purposes of Rule 28.1 of the Rules of this Court.

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JURISDICTIONAL STATEMENT

Mobile Dodge, Inc., the appellant, appeals from so much of a final decision of the Supreme Court of Alabama dated February 14, 1986, as affirmed a judgment of approximately $124,000 in punitive damages against it by the Circuit Court of Mobile County, the order of that Court dated February 14, 1986 and issued by the clerk of the court below on May 13, 1986 by which a ten percent appeal penalty was imposed on the appellant pursuant to § 12-22-72, *Code of Alabama* (1975), and the order of the Supreme Court of Alabama dated April 25, 1986, overruling appellant's Application for Rehearing filed with respect to the February 14, 1986 decision. Under this decision and these orders, appellant's rights under the Excessive Fines Clause of the Eighth Amendment, as made applicable to the States by the Due Process Clause of the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment, have been denied. Moreover, § 12-22-72, *Code of Alabama* (1975), under which an automatic penalty of ten percent of the total $125,000 judgment was imposed on appellant, has been upheld, *sub silentio*, against appellant's claim that that statute on its face and as applied violates appellant's rights under the Equal Protection Clause of the Fourteenth Amendment.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama of February 14, 1986 is reproduced in App. A, *infra*, 1a-13a, and is officially reported at 487 So.2d 866 (Ala. 1986). The order of the Supreme Court of Alabama of April 25, 1986 is reproduced in App. B,

infra, 14a-15a, and is unreported. The order of the court below of February 14, 1986 is reproduced as App. C, *infra*, 16a-17a, and is unreported. The Circuit Court of Mobile County issued no opinion.

JURISDICTION

The February 14, 1986 decision, and February 14 and April 25 orders of the Supreme Court of Alabama necessarily upheld, *sub silentio*, § 12-22-72, *Code of Alabama* (1975), against appellant's claim under the Equal Protection Clause of the Fourteenth Amendment that § 12-22-72 is facially unconstitutional. Because the February 14 order assessing a ten percent penalty against appellant pursuant to this statute was compelled by the February 14, 1986 decision of the Supreme Court of Alabama and was therefore not part of any appealable judgment until that time, appellant's federal constitutional challenge to § 12-22-72 was, pursuant to an unbroken line of seventeen cases decided over a 125-year period by the Supreme Court of Alabama, presented in appellant's brief in support of its Application for Rehearing.[1] A Notice of Appeal of this case to this Court was filed in the court below on July 18, 1986. App. D, *infra*, 18a. This Court has jurisdiction of this case under 28 U.S.C. § 1257(2). Question 2 was duly presented to the Supreme Court of Alabama as discussed *infra* and may be decided

[1] Under Rule 20, Ala. R. App. P., "Assignments of error are not required. Statement of the issues presented on appeal in the appellant's brief as required by Rule 28 shall be sufficient." This Court has expressly relied upon presentation in briefs before the Supreme Court of Alabama in finding that a federal question was properly presented. *NAACP* v. *Alabama*, 377 U.S. 288, 293 n.4 (1964). Appellant has lodged with the Clerk of this Court ten copies of its Brief in Support of Its Application for Rehearing in connection with the docketing of this appeal.

with this appeal. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

This appeal is being docketed in this Court within 90 days from the April 25, 1986 order of the Supreme Court of Alabama overruling appellant's Application for Rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Excessive Fines Clause of the Eighth Amendment of the Constitution, provides, in pertinent part, that:

> [N]or [shall] excessive fines [be] imposed . . . .

2. The Due Process Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> [N]or shall any State deprive any person of . . . property, without due process of law . . . .

3. The Equal Protection Clause of the Fourteenth Amendment of the Constitution, provides, in pertinent part, that:

> [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

4. Section 12-22-72, *Code of Alabama* (1975), provides, in pertinent part, that:

> When a judgment . . . is entered . . . for money . . . and the same has been stayed on appeal by execution of bond, with surety, if the appellate court affirms the judgment of

> the court below, it must also enter judgment against any or all of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court . . . .

STATEMENT OF THE CASE

Appellant seeks plenary consideration of its contentions that so much of a total judgment of $125,000 as was imposed on it in punitive damages, and the $12,500 appeal penalty automatically adjudged on that $125,000 total judgment under § 12-22-72, *Code of Alabama* (1975), have deprived appellant of substantial rights guaranteed by the specific provisions of the Constitution of the United States enumerated above. The constitutional issues presented are substantial; Question 2 is virtually identical to Question 4 as briefed and argued to, but not decided by, this Court in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (April 22, 1986), 106 S. Ct. 1580 (1986). Question 1 is identical to Question 1 as presented to this Court in *Burlington Northern R. Co.* v. *Woods*, No. 85-1088 (*cert. granted*, March 24, 1986). These issues, as the following discussion demonstrates, are substantial and were properly presented to the Supreme Court of Alabama.

A. Facts Relevant to the Constitutional Questions Presented[2]

On July 4, 1982, Frank W. Allison purchased a 1978 Corvette from a Texas automobile dealer. On August

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[2] The subsequent recitation of facts is largely limited to those facts relevant to only one of the counts of the complaint which went to the jury. That count, App. A, *infra*, 7a, 487 So.2d, at

16, 1982, he applied for a certificate of title for the Corvette in Alabama and on September 26, 1982, the Corvette was traded by Mr. Allison to the appellant as a down payment on a new truck. On September 30, 1982, the appellee purchased the Corvette from the appellant and, in that transaction, the appellant warranted that it had good title to the Corvette. The vehicle identification number ("V.I.N.") given for the Corvette in the bill of sale was V.I.N. 9392.

The Alabama title to the vehicle did not actually issue to the appellee until February 2, 1983. Before issuance of that title, the vehicle had been inspected by John Reid, a criminal investigator with the Alabama Bureau of Investigation. That inspection came as a consequence of the fact that Mr. Allison's basis for applying for an Alabama title was a "salvage certificate of title" issued by the State of Texas. The purpose of that inspection was to ensure that the V.I.N.s stamped on the vehicle in several places were all the same. Mr. Reid's inspection disclosed V.I.N. 9392 stamped on the Corvette in three places and, based on that inspection, an Alabama title was issued for V.I.N. 9392.

Subsequently to the filing of this lawsuit, the Corvette was reinspected by Mr. Reid at the request of appellee's attorney; that inspection revealed for the first time that the Corvette was really an amalgam of two Corvettes; the V.I.N. on the frame of the

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869, charged that appellant had misrepresented to the appellee that it was giving him good title to the Corvette. As explained in the opinion of the court below, App. A, *infra*, 8a, 487 So.2d, at 869-70 & n.1, this misrepresentation count had to be sustained as a matter of state law in order for the jury's general verdict to stand.

vehicle—not checked by Mr. Reid on his first inspection—was V.I.N. 4708. Mr. Reid subsequently determined that a Corvette with V.I.N. 4708 had been stolen in 1978 while in transit in Kentucky.

The appellee filed this action on January 12, 1983. After the evidence was presented to the jury, the trial court instructed the jury regarding the appellee's claim for punitive damages, stating: "The purpose of awarding punitive or exemplary damages is to allow money recovery to the plaintiff by way of punishment to the defendant and for the added purpose of protecting the public by deterring the defendant and others from doing such wrong in the future." (RR-265). (Ten copies of the pertinent portion of the jury instruction have been lodged with the Clerk of this Court in connection with the docketing of this appeal). After trial, the jury returned a general verdict in favor of the appellee in the sum of $125,000, *see* note 11, *infra*, and this appeal followed.

The count of the complaint at issue in the Supreme Court of Alabama on appeal was based on a right of action under § 6-5-103, *Code of Alabama* (1975). That statute creates a right of action for "misrepresentation of a material fact made to induce another to act" and, when enacted, was merely declaratory of the common law. *Horton* v. *Belcher*, 195 Ala. 186, 70 So. 141 (1915). The specific misrepresentation alleged and found by the court below to have been supported by sufficient evidence involved appellant's representation to the appellee that in selling the Corvette, the appellant had a good title to the vehicle to transfer to the appellee.

The jury's verdict and the trial court's judgment were affirmed on the basis of the conclusion of the

court below that the appellant "knew or should have known that it did not have good title to the Corvette . . . ." App. A, *infra*, 8a, 487 So.2d, at 870.

B. The Federal Questions Were Properly Presented

Appellant recognizes that it bears the burden to persuade this Court of its jurisdiction over this appeal in the absence of any express reference in the opinion of the court below to the federal constitutional provisions relied upon by appellant in that court. *Illinois* v. *Gates*, 462 U.S. 213, 218 n.1 (1983).

1. Presentation of the Federal Constitutional challenge to § 12-22-72, *Code of Alabama* (1975)

Question 1, challenging the constitutionality of § 12-22-72, *Code of Alabama* (1975), was presented to the court below in appellant's brief filed in support of its Application for Rehearing, note 1, *supra*, at 20-23. This was the logical time for appellant to present its challenge to § 12-22-72's constitutionality, since the non-discretionary imposition by the court below of the ten percent penalty on the $125,000 total judgment was not at issue or reduced to any appealable order until that judgment was affirmed.

Appellant's challenge to § 12-22-72 was properly and timely presented in complete conformity with relevant decisions of the Supreme Court of Alabama—a line of at least seventeen cases dating from 1861 in which the federal constitutionality of, or questions regarding the construction of, § 12-22-72 have been drawn into

question at the rehearing stage.[3] In one such case, § 12-22-72 was challenged under the Equal Protection Clause for the first time in an Application for Rehearing in the Supreme Court of Alabama. Without any suggestion that raising the issue at that stage was in any way improper or inconsistent with Alabama practice, the Supreme Court of Alabama, consistent with its routine practice, entertained (and rejected) that federal constitutional challenge to § 12-22-72 on the merits. *Central of Georgia Ry. Co.* v. *Steed*, 287 Ala. 64, 76-77, 248 So.2d 110, 120-21 (1979).

It is also important to note that the Supreme Court of Alabama did not in this case—as it might have done—*deny* appellant's Application for Rehearing, an action which would have indicated that appellant's

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[3] The Supreme Court of Alabama has routinely permitted constitutional and statutory questions regarding § 12-22-72 to be raised in an Application for Rehearing or an equivalent post-judgment motion. *See Brown Mech. Contractors, Inc.* v. *Centennial Ins. Co.*, 431 So.2d 932 (Ala. 1983); *First Alabama Bank of Montgomery, N.A.* v. *Martin*, 425 So.2d 415 (Ala. 1983); *Chapman* v. *Rivers Const. Co.*, 284 Ala. 633, 227 So.2d 403 (1969); *City of Troy* v. *McLendon*, 279 Ala. 553, 188 So.2d 281 (1966); *Goodyear Tire & Rubber Co.* v. *Downey*, 266 Ala. 344, 96 So.2d 278 (1957); *Patterson* v. *Gains*, 264 Ala. 184, 85 So.2d 893 (1956); *Lloyd* v. *Stewart*, 258 Ala. 627, 64 So.2d 884 (1953); *Childress* v. *Younger*, 258 Ala. 219, 61 So.2d 808 (1952); *City of Birmingham* v. *Bowen*, 254 Ala. 41, 47 So.2d 174 (1950; *Atlanta, Birmingham & Coast R. Co.* v. *Cary*, 250 Ala. 675, 35 So.2d 559 (1948); *Carter* v. *Carter*, 247 Ala. 409, 24 So.2d 759 (1945); *Snellings* v. *Builders' Supply Co.*, 229 Ala. 1, 155 So. 858 (1934); *Dent* v. *Foy*, 210 Ala. 160, 97 So. 627 (1923); *Montgomery Light & Water Power Co.* v. *Thombs*, 204 Ala. 678, 87 So. 205 (1920); *New York Life Ins. Co.* v. *Reese*, 201 Ala. 673, 79 So. 245 (1918); *Lawrence* v. *Jones*, 37 Ala. 388 (1861).

challenge to § 12-22-72 had not been timely presented. Instead, the court below *overruled* appellant's application, an action which, under the practice of the court below, indicates that the court reached and rejected appellant's challenge to § 12-22-72 on the merits. *See, e.g., Hamm* v. *Harrigan*, 278 Ala. 521, 179 So.2d 154 (1965), *cert. denied*, 382 U.S. 981 (1966); *Thompson* v. *State*, 268 Ala. 483, 489, 107 So.2d 890, 895 (1959).

In light of this longstanding and consistent practice, the action of the court below in overruling appellant's Application for Rehearing without any opinion must be deemed by this Court as having implicity upheld the constitutionality of § 12-22-72; that action was presumptively not based on lack of proper presentation of this question. In addition, this Court long ago made abundantly clear that a state court's procedural rules governing presentation of federal questions will not bar this Court's power to review such questions unless those rules are "strictly or regularly" followed. *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964). Here, the rule in Alabama that has been "regularly" followed itself establishes that appellant challenged § 12-22-72 in a timely fashion.[4]

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[4] Appellant would also bring an additional point to this Court's attention. Appellant presented its challenge to 12-22-72 in a manner indistinguishable from the challenge to the same statute raised by the petitioner in *Burlington Northern R. Co.* v. *Woods*, No. 85-1088 (*cert. granted*, March 24, 1986) ("*Burlington Northern*"). In granting that petition for writ of certiorari in the face of an order of the Eleventh Circuit which did not address the merits of the petitioner's constitutional challenge to § 12-22-72, Pet. for Cert., at A-1, this Court necessarily recognized that, as a matter of logic and practice, a challenge to Alabama's

2. Presentation of the Federal Constitutional Challenge to the Excessiveness of the Punitive Damage Award

The excessiveness of the punitive damage award was first challenged by appellant on November 23, 1983 in its post-trial Motion for Judgment Notwithstanding the Verdict, or in the Alternative, For New Trial and/or Remittitur.[5] The substance of Question 2 was also raised in the Brief of Appellant filed with the Supreme Court of Alabama on direct appeal on June 14, 1984. In that brief, appellant brought to the

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appeal penalty statute may be brought after a money judgment has been affirmed. Although the question when a challenge to § 12-22-72 must be raised in order to be considered by the court below is technically an issue of Alabama law, appellant's assertion that such a challenge may be raised by post-affirmance motion is not only not contradicted by any case in the court below, but is also recognized as appropriate by the only other court which has been called upon to apply § 12-22-72. Thus, the Eleventh Circuit has entertained and decided in post-affirmance proceedings various questions arising out of applications of § 12-22-72 to diversity cases coming to it on appeal from the federal district court in Alabama. *See, e.g., Burlington Northern, supra.*

The same understanding also governs with respect to challenges to Mississippi's virtually identical appeal penalty statute, *Miss. Code Ann.* § 11-3-23 (Supp. 1982), in both the Mississippi courts, *see, e.g., Wallace* v. *Jones*, 360 So.2d 932 (Miss. 1978) (federal constitutional challenge in post-affirmance proceeding to § 11-3-23 entertained and decided against the challenge), and the Fifth Circuit, *see, e.g., Affolder, Inc.* v. *Southern Rock, Inc.*, 746 F.2d 305 (5th Cir. 1984) (on motion to assess damages for appeal; motion denied); *Walters* v. *Inexco Oil Co.*, 725 F.2d 1014 (5th Cir. 1984) (post-affirmance motion in district court to assess penalty; motion granted).

[5] Ten copies of appellant's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for New Trial and/or Remittitur, have been lodged with the Clerk of this Court in connection with the docketing of this appeal.

attention of the court below "the resemblance of punitive damages to criminal sanctions" and argued that the punitive damage award was "excessive."[6] Question 2 was presented once again in appellant's brief in support of its Application for Rehearing; in that brief, at 10, 11, 13 & 14, appellant, for the first time, expressly relied on the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment in support of its argument that the punitive damage award was excessive. Appellant submits that the question raised at the rehearing stage was no more than an "enlargement of the previous challenges" to the excessiveness of the punitive damage award, *Dewey* v. *Des Moines*, 173 U.S. 193, 194-95 (1899), and it is precisely the question appellant presents in this appeal. Thus, appellant is entitled to this Court's review of that question.

Furthermore, no Alabama statute, or rule of civil or appellate procedure, precludes raising new questions in an Application for Rehearing after the announcement of a decision of the Supreme Court of Alabama. Thus, as in Mississippi, *see Hathorn* v. *Lovorn*, 457 U.S. 255, 263 n.13 (1982), the issue of proper presentation is resolved by reference to the actual practice of the Supreme Court of Alabama established by decisional law of that court.

It is clear that the court below does, as a matter of its own practice, entertain and decide constitutional and nonconstitutional questions raised for the first

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[6] Br. of Appellant, at 49, 38. Ten copies of the pertinent portions of appellant's brief on direct appeal to the Supreme Court of Alabama have been lodged with the Clerk of this Court in connection with the docketing of this appeal.

time in an Application for Rehearing. In addition to the seventeen cases cited in note 3 and accompanying text, *supra*, the court below has entertained and decided a wide variety of new questions, including constitutional questions, raised in applications for rehearing over many years.[7] Indeed, even where the court below suggests that it cannot or will not pass on new questions said to be "improperly" raised, it frequently will proceed to pass on such questions. *See, e.g., Lovett* v. *Uptain*, 450 So.2d 113, 116 (Ala. Civ. App. 1983), *aff'd sub nom. Ex parte Lovett*, 450 So.2d 116, 118 (Ala. 1984); *King* v. *Reid*, 428 So.2d 611, 615 (Ala. 1983); *Kirkland* v. *Kirkland*, 281 Ala. 42, 49, 198 So.2d 771, 777 (1967); *Ex parte Hanna*, 267 Ala. 527, 103 So. 2d 720 (1958).

Thus, under the circumstances of this case, even an express ruling by the court below denying appellant's Application for Rehearing on procedural grounds would not have extinguished this Court's power to decide these federal constitutional questions. This Court's decision in *Barr* v. *City of Columbia*,

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[7] *Louisville & Nashville Ry. Co.* v. *Western Union Telegraph Co.*, 195 Ala. 124, 71 So. 118 (1916); *Dunn* v. *Dean*, 196 Ala. 486, 71 So. 709 (1916); *Copeland* v. *Pope*, 198 Ala. 257, 73 So. 490 (1916); *Gibbons* v. *Gibbons*, 205 Ala. 636, 88 So. 833 (1921); *Martin Building Co.* v. *Imperial Laundry Co.*, 220 Ala. 90, 124 So. 82 (1929); *Consolidated Coal Co.* v. *State*, 236 Ala. 489, 183 So. 650 (1938); *Huie* v. *Smith*, 236 Ala. 516, 183 So. 661 (1938); *Federal Land Bank of New Orleans* v. *Williams*, 237 Ala. 318, 186 So. 689 (1939); *Dodson* v. *Beaird*, 237 Ala. 587, 187 So. 862 (1939); *Sisson* v. *Swift*, 243 Ala. 289, 9 So.2d 891 (1942); *Goodgame* v. *Dawson*, 242 Ala. 499, 7 So.2d 77 (1942); *Rudolph* v. *Rudolph*, 251 Ala. 317, 36 So.2d 902 (1948); *Howell* v. *Roueche*, 263 Ala. 83, 81 So.2d 297 (1955); *Bienville Mortgage Corp.* v. *Mayo*, 286 Ala. 675, 245 So.2d 819 (1971).

378 U.S., at 149, requires that procedural barriers to consideration of federal questions be "strictly or regularly followed" in order to deprive this Court of power to review substantial federal constitutional questions. There was, of course, no such express ruling below and, as pointed out above, the "overruling" of appellant's Application for Rehearing strongly suggests, standing alone, that appellant's constitutional questions were rejected on their merits.

As this Court has recently stated, "State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." *Hathorn* v. *Lovorn*, 457 U.S., at 263. Indeed, this Court's decision in *Hathorn* suggests that a state court's *past* consistent practice of refusing to consider new issues raised on rehearing will not preclude review of federal constitutional questions by the Court where the *current* practice of that state court is to consider such issues. *Hathorn* v. *Lovorn*, 457 U.S., at 263-64 & nn.13-14. It is clear that the Supreme Court of Alabama has not in the past, nor does it now, consistently refuse to consider issues raised for the first time in an Application for Rehearing.[8]

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[8] *See* notes 3 & 7, *supra*. This Court's suggestion to the contrary in *Exxon Corp.* v. *Eagerton*, 462 U.S. 176 (1983), is neither dispositive of this issue nor can its suggestion in *Exxon* be reconciled with its holding in *Hathorn* v. *Lovorn*, *supra*. In the *Exxon* case, this Court declined to reach the question whether the Alabama statute at issue was preempted by the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 *et seq.* (1976 ed. and Supp. V) ("EPAA"). In doing so, the Court observed that the "general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal." 462

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

The substantiality of the federal questions to be presented in this appeal is established by this Court's

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U.S., at 181 n.3. This observation, however, was made without any briefing of this issue by any of the parties before the Court. Appellant has brought to the attention of this Court in this Jurisdictional Statement thirty-five cases in the court below in which issues raised for the first time *on rehearing* have been decided on the merits.

Appellant's point is not academic. For example, one of the cases relied on in footnote 3 of *Exxon* was *Burton* v. *Burton*, 379 So.2d 617, 618 (Ala. Civ. App. 1980), in which, because it had not been raised in a timely fashion, the Court of Civil Appeals refused to decide an equal protection challenge similar to that decided by this Court in *Orr* v. *Orr*, 440 U.S. 268 (1979). That same court had previously refused to entertain a similar challenge for the same reason in *Hughes* v. *Hughes*, 362 So.2d 910 (Ala. Civ. App.), and the Supreme Court of Alabama dismissed a petition for a writ of certiorari. *Hughes* v. *Hughes*, 362 So.2d 918 (Ala. 1978). Notwithstanding these actions by the Alabama courts, which were brought to the attention of this Court by the appellee in *Hughes*, Motion to Dismiss or Affirm, at 2, this Court took jurisdiction over the appeal in *Hughes* and vacated the judgment of the court below. *Hughes* v. *Hughes*, 441 U.S. 901 (1979). The *Exxon* Court's citation of *Burton* cannot be reconciled with the Court's action in *Hughes* any more than its assumption in *Exxon* regarding the general practice of the Alabama courts can be reconciled with the many cases now brought to the Court's attention by appellant. The Court's action in *Exxon* can, however, be explained by reference to the suggestion by the Solicitor General in *Exxon* that because the issue of preemption under the EPAA had not been raised in the trial court, the record before the Court was factually deficient for purposes of deciding that preemption issue. Br. for the United States and the Federal Energy Regulatory Commission as *Amici Curiae* Supporting Reversal, at 12 n.10. There is no such de-

decision in *Aetna Life Insurance Co.* v. *Lavoie*, slip op., at 14, 106 S. Ct., at 1589, and by this Court's grant of certiorari in *Burlington Northern* as to the constitutionality of Alabama's appeal penalty statute. Accordingly, because the Court is already quite familiar with the questions involved, appellant will only briefly set forth its arguments that the questions are substantial.

A. The Unconstitutionality of § 12-22-72, Code of Alabama (1975)

Under § 12-22-72, *Code of Alabama* (1975), a defendant-appellant, like appellant here, is subjected to an automatic, non-discretionary ten percent penalty payable to the appellee upon affirmance of a money judgment without regard to the novelty or complexity of the factual or legal issues presented in a particular appeal.

If § 12-22-72 is designed to prevent frivolous appeals, it is both indiscriminately overinclusive and unreasonably severe, because it punishes those who pursue non-frivolous appeals in an extravagant sum totally unrelated to the costs imposed by that appeal on the appellee. At the same time, it is irrationally

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ficiency here.

The other two cases in the court below relied upon in footnote 3 of *Exxon*, *State* v. *Newberry*, 336 So.2d 181, 183 (Ala. 1976), and *State* v. *Graf*, 280 Ala 71, 72, 189 So.2d 912, 913 (1966), do not pronounce a rule of general applicability; rather, they apply a distinct rule under which the State, in condemnation proceedings, is precluded from raising certain issues on appeal if it has not challenged the damages awarded for the particular taking involved. Thus, those two cases are readily distinguishable as involving a "special rule." *Hathorn* v. *Lovorn*, 457 U.S., at 263 n.13.

underinclusive because a plaintiff who fails to recover a money judgment at trial may take an unsuccessful appeal on wholly frivolous grounds without the risk of any comparable penalty whatsoever.[9]

Appellant will argue to the Court that this statute, which exists in the same non-discretionary form in only one other State, Mississippi, is irreconcilable with, and therefore must be struck down under, this Court's decision in *Lindsey* v. *Normet*, 405 U.S. 56 (1972). In *Lindsey*, this Court invalidated an Oregon Statute that required a particular class of losing defendants, tenants, to post a double bond in order to appeal from a judgment in favor of their landlord. The Court stated that a State may act "to discourage patently frivolous appeals . . . if [its] rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied." *Id.*, at 78. Section 12-22-72 fails both these tests.

If, as the Aetna Life Insurance Company argued to this Court in No. 84-1601, and as the Burlington Northern Railroad Company argues in its petition for certiorari in No. 85-1088, § 12-22-72 functions to deny losing appellants an equal opportunity to pursue their right of statutory appeal within the Alabama courts and the right of appeal within the federal court sys-

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[9] Under Rule 38, Ala. R. App. P., both plaintiffs and defendants who take appeals in civil cases are treated in an evenhanded manner as regards the *damages* and *costs* incurred in defending a judgment that is appealed either by plaintiffs or defendants where the judgment below is affirmed and the appeal is determined to have been frivolous. This rule, in sharp contrast to § 12-22-72, adequately fulfills the legitimate state purpose of curbing abuse of the right to appeal and serves to accentuate the arbitrariness of § 12-22-72.

tem in diversity cases, then the need for this Court to address this question is manifest.[10]

B. The Excessive Fines and Due Process Clause Question

The question whether the Excessive Fines Clause applies to a punitive damage award that is grossly disproportionate to punishments imposed by the State of Alabama for analogous criminal conduct was briefed and argued in *Aetna Life Insurance Co.* v. *Lavoie*, *supra*, and is currently before this Court in *Treadwell Ford, Inc.* v. *Campbell*, No. 85-1799 (appeal docketed May 7, 1986). The arguments advanced to the Court by the appellants in *Aetna* and *Treadwell Ford* are fully applicable to this case.

As this Court's decision in *Solem* v. *Helm*, 463 U.S. 277 (1983), establishes, the historical roots of the Excessive Fines Clause and the "principle that a punishment should be proportionate to the crime" may be traced back to Magna Carta's regulation of "excessive amercements." 463 U.S., at 284. Indeed, as the Court observed in *Solem*, the guarantees in Magna Carta against the imposition of excessive fines were not "hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments." *Id.*, at 285. A case relied on by the Court to support this statement, *Le Gras* v. *Bailiff of Bishop of Winchester*,

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[10] If this Court were to decide in *Burlington Northern* that § 12-22-72 is "procedural" for purposes of the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), and that therefore the penalty assessed under § 12-22-72 against Burlington Northern was wrongly assessed on that ground, this Court would presumably not reach Question 1 presented in Burlington Northern's petition for certiorari—whether § 12-22-72 is unconstitutional under the Fourteenth Amendment.

Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), *reprinted in* 52 Selden Society 3 (1934), illustrates the application of the excessive amercement principle of Magna Carta to a fine imposed in a civil proceeding. That principle, incorporated into the English Bill of Rights of 1689, 1 Wm. & Mary, Sess. 2, Ch. 2, and subsequently into the Virginia Declaration of Rights (1776), was then enshrined in the Eighth Amendment by its Framers. *Solem* v. *Helm*, 463 U.S., at 285 & n.10.

There is no disagreement in this Court with the proposition that "[s]ome punishments, though not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment." *Ingraham* v. *Wright*, 430 U.S. 651, 669 n.37 (1977); *id.*, at 685 (White, J., dissenting). If the imposition of a large fine in order to punish and deter others is not sufficiently analogous to a criminal punishment for the Eighth Amendment to apply, serious doubt would be cast on the continuing vitality of cases such as *Trop* v. *Dulles*, 356 U.S. 86 (1958), and *In re Gault*, 387 U.S. 1 (1967), which have been cited by this Court as examples of punishment administered in non-criminal proceedings to which the Eight Amendment is applicable. *Ingraham* v. *Wright*, 430 U.S., at 669 n.37 & 671-72 n.40.

The punitive damage award in this case comprised approximately $115,000 to $124,000 of the total $125,000 award to the appellee.[11] It is clear under

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[11] The trial court instructed the jury that the appellee could recover punitive and compensatory damages. The jury returned a general verdict of $125,000 and, as observed by the court

the law of the court below that punitive damages are imposed for the sole purposes of punishment and deterrence. *See, e.g., Carter* v. *City of Birmingham*, 444 So.2d 373 (Ala. 1983), *cert. denied*, 467 U.S. 1211 (1984); *State Docks Commission* v. *Barnes*, 225 Ala. 403, 143 So. 581 (1932). Similarly, punitive damages awarded in fraud cases, customarily referred to by the court below as "sweat money," are intended to punish the defendant and to set an example to others who may have contemplated similar actions. *Southern Life and Health Insurance Co.* v. *Whitman*, 358 So.2d 1025, 1027 (Ala. 1978) (Jones, J., concurring); *Old Southern Life Insurance Co.* v. *Woodall*, 348 So.2d 1377, 1383 (Ala. 1977); *Loch Ridge Construction Co.* v. *Barra*, 291 Ala. 312, 317, 280 So.2d 745, 751 (1973).[12]

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below, determination of how much of that $125,000 total award constituted punitive damages was not an issue it had to resolve. App. A, *infra*, 13a, 487 So.2d, at 872. In the appellee's brief on direct appeal, at 44, appellee took the position that $115,672 of the total award constituted punitive damages. Ten copies of the pertinent portion of appellee's brief have been lodged with the Clerk of this Court in connection with the docketing of this appeal. Appellant took the position that only $1,000 of that award constituted compensatory damages, *see* Br. of Appellant, at 38, note 6 *supra*. Appellant is prepared to assume, for purposes of this appeal, that the figure of $115,672 comprises all of the punitive damages awarded; the actual amount, an issue of state law, is pertinent only to the relief to be awarded to appellant on remand of this case to the court below should appellant prevail on Question 2.

[12] These characterizations of the purposes of these types of punitive damage awards pretermits the need for the kind of searching inquiry into the intent behind the authorization for a particular fine or punishment that has normally accompanied this Court's decisions applying constitutional provisions such as the

This punitive damage award is grossly disproportional to the wrong it punishes. If appellant's conduct against the appellee were punishable under Alabama's criminal statutes related to business fraud and conspiracy, and if appellant had been convicted of business fraud and conspiracy under those statutes after enjoying the full protections of the Sixth and Fourteenth Amendments, the maximum monetary penalty that could be assessed against appellant would be $1,500. §§ 13A-4-3, 13A-5-12 and 13A-9-41 *et seq.*, *Code of Alabama* (1975). Thus, the punitive damage award in this case is at least 77 times the maximum punishment assessed by the Alabama legislature for business conduct of a similar nature which has been adjudicated to be a crime. Under those Alabama statutes, the fine imposed also would have been paid into the treasury of Alabama, whereas the award to the appellee is nothing more than a windfall.

Whether addressed under the Excessive Fines Clause or directly under the Due Process Clause of the Fourteenth Amendment, the gross disproportionality of the fine in this case, exacerbated by the magnifying effect of the additional ten percent penalty imposed by § 12-22-72, *Code of Alabama* (1975), presents a substantial federal question. There is no significant state interest in meting out punishment in a civil proceeding "based upon the caprice and prejudice of jurors." *Smith* v. *Wade*, 461 U.S. 30, 51 (1983) (Rehnquist, J., dissenting).

As illustrated by this case and other cases in the court below either presently on this Court's docket,

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Bill of Attainder Clause to cases involving neither a criminal trial as such nor incarceration. *See, e.g., United State* v. *Lovett*, 328 U.S. 303 (1946).

Treadwell Ford, Inc. v. *Campbell, supra*, or recently disposed of by this Court, *Aetna Life Insurance Co.* v. *Lavoie, supra*, the apparent rule of law in Alabama is that punitive damage awards may be imposed in large and wholly whimsical sums by juries. Indeed, on November 15, 1985, the Supreme Court of Alabama affirmed, after remittitur, a judgment of $2,800,000 in punitive damages against General Motors Corporation for wrongful death in connection with an automobile crash. *General Motors Corp.* v. *Edwards*, 482 So.2d 1176 (Ala. 1985). Thus, for the routine conduct of business in Alabama, businesses subject themselves to the imposition of enormous punitive damage awards by juries which have been given *carte blanche* by the Alabama courts to create and impose their own systems of fines in each and every case that goes to a jury. In the absence of a decision by this Court holding that the Excessive Fines Clause controls punitive damage awards, the court below will continue to defer to the jury's unbridled discretion to award excessive punitive damages.

This Court has the power and responsibility under the Eighth and Fourteenth Amendments to place constitutional restraints on such arbitrary awards. The punitive damage award here is excessive both in kind, because it serves no valid state purpose, and in degree, because it is grossly disproportionate to the level of punishment imposed by the Alabama legislature for analogous criminal conduct.

CONCLUSION

Appellant's federal constitutional claims are substantial. Appellant has been fined an amount grossly out of proportion to the punishment which could have

been imposed upon it under Alabama statutes punishing analogous criminal conduct, and it has been fined severely and arbitrarily for exercising its statutory right to appeal that judgment to the State's highest court.

This Court had before it the substance of these issues in a virtually identical context in *Aetna Life Insurance Co.* v. *Lavoie*. In its decision in *Aetna*, this Court stated in unmistakable words that "these arguments raise important issues which, in an appropriate setting, must be resolved . . . ." Slip op., at 14, 106 S. Ct., at 1589. This case presents an "appropriate setting" in which to resolve these important issues. Appellant has pressed its federal constitutional challenges to this punitive damage award and to § 12-22-72 at every appropriate stage in this litigation.[13]

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[13] Appellant is clearly entitled to have applied to this case any ruling of this Court on Question 1 as presented in *Burlington Northern* or this Court's ruling in any other case in which questions similar to those presented by appellant may be presented to and decided by this Court. *See, e.g., Henry* v. *Collins*, 380 U.S. 356 (1965) (*per curiam*) (application of constitutional rule announced in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), to libel judgment on certiorari to Supreme Court of Mississippi); *Hughes* v. *Hughes*, 441 U.S. 901 (1979) (application of decision in *Orr* v. *Orr*, 440 U.S. 268 (1979), to case on appeal from Supreme Court of Alabama notwithstanding that Alabama courts had held federal question not timely presented).

Because this Court took no action during its October, 1985 Term on the appeals docketed in *American General Life and Accident Ins. Co.* v. *Miller*, No. 85-1429 (appeal docketed Feb. 26, 1986), *Bankers Life and Cas. Co.* v. *Crenshaw*, No. 85-1765 (appeal docketed Apr. 25, 1986), and *Treadwell Ford, Inc.* v. *Campbell*, No. 85-1799 (appeal docketed May 7, 1986), all of which raise jurisdictional and substantive issues similar or iden-

Probable jurisdiction should be noted and this case set for argument.

July 24, 1986 Respectfully submitted,

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tical to the jurisdictional and substantive issues presented by this appeal, appellant assumes that the Court may want to hold this case at least until issuance of its decision in *Burlington Northern R. Co.* v. *Woods* is handed down. Irrespective of which question(s) is reached and decided in *Burlington Northern*, this case should continue to be held until another case on the Court's docket which presents Question 2 presented herein has been accorded plenary consideration and decided. At that point, an appropriate disposition of this appeal can be made based upon this Court's decision on the merits of the applicability of the Excessive Fines Clause to punitive damage awards imposed in civil actions. If decided favorably to the appellant herein, the decision in this case should then be vacated and remanded to the court below for reconsideration on that basis and also on the basis of *Burlington Northern* if § 12-22-72 is declared unconstitutional in that case.

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APPENDIX

APPENDIX A

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1985-86

84-1006

MOBILE DODGE, INC., a Corporation
v.
DANNY R. ALFORD

APPEAL FROM MOBILE CIRCUIT COURT

FILED
FEB. 14, 1986
CLERK
SUPREME COURT OF ALABAMA
HOUSTON, JUSTICE.

Mobile Dodge, Inc., appeals from the judgment of the trial court entered pursuant to a jury verdict of $125,000 in favor of the plaintiff, Danny Alford, in this action for fraud arising from the sale of 1978 Chevrolet Corvette. We affirm.

The Corvette which was sold by Mobile Dodge to Alford had been rebuilt with parts from two automobiles, one bearing vehicle identification number 1Z87L8S414708 (hereinafter V.I.N. 4708), and the other bearing vehicle identification number 1Z87LS419392 (hereinafter V.I.N. 9392). The automobile bearing V.I.N. 4708 had been stolen

in 1978 while in transit from Louisville, Kentucky. The automobile bearing V.I.N. 9392 had been wrecked in Texas in 1981. Most of the remaining material facts in the case are in dispute.

The following evidence was presented by the plaintiff which the jury could have believed, and evidently did:

On September 30, 1982, Alford bought a 1978 Corvette, which appeared to be a "Silver Anniversary" model, from Mobile Dodge. He had been told by the salesman at Mobile Dodge that the automobile was in excellent condition and had never been wrecked. He was also told that the Corvette was eligible for a "Chrysler Used Vehicle Protection Plan" which would have protected him from loss if major repairs were to become necessary.

Twenty days after the purchase, Alford was given notice that the Corvette was not eligible for the Used Vehicle Protection Plan. Meanwhile, Alford had been having problems with the Corvette. He testified that that sun visor on the Corvette had fallen off; the power windows would not work; one of the pillar posts was out of line; the "air conditioner blew out hot and cold air at the same time"; the harmonic balancer had fallen off; and the transmission support had "busted," knocking both mufflers off.

Disturbed and dissatisfied with the service he had received from Mobile Dodge, Alford took the Corvette to Gulf Coast Corvettes, a repair shop specializing in Corvettes. The owner of that shop, Bob Gechijian, testified that when he inspected the Corvette, he found a clutch pedal hidden under the floor carpet. He testified this was an indication that the automobile, although it now had an automatic transmission, had once had a standard transmission. The fact was substantiated by the presence of a smaller brake pedal than would normally accompany an automatic transmission.

Gechijian further testified that the factory metal transmission lines had been cut and replaced with rubber hose.

He stated that these rubber hose lines created a dangerous condition because transmission fluid is corrosive to rubber. Moreover, he discovered that although the Corvette appeared to be a "Silver Anniversary" 1978 Corvette, in fact, it was not; it had been repainted to resemble that particular Corvette model. Gechijian testified that it was his opinion that someone with knowledge of Corvettes would have noticed that the automobile had been repainted and would have realized that the small brake pedal was inconsistent with an automatic transmission. He testified that these facts indicated that the automobile had been wrecked and then rebuilt. Armed with that suspicion, he stated, a dealer should have put the automobile up on a rack. If they had done so, according the Gechijian, the dealer would have discovered extensive rust in the frame and noticed other damage to the frame.

Alford's problems with the Corvette were not limited to these mechanical difficulties. On September 30, 1982, the same day Alford bought the Corvette, the Alabama Department of Revenue sent a letter to John Reid, a criminal investigator with the Department of Public Safety—Alabama Bureau of Investigation (ABI), requesting that he check the vehicle identification numbers on this Corvette. When Reid went to Mobile Dodge to inspect the Corvette, Mobile Dodge informed him of the sale to Alford. Within thirty days of the time the request to investigate was made of him, Reid contacted Alford and told him to bring the Corvette by a certain Chevron service station for an inspection.

Corvettes have vehicle identification numbers in four places: the engine, transmission, left door pillar post, and on the frame. Reid determined by looking at the engine, transmission, and pillar post numbers that they were all V.I.N. 9392. Since the service station rack was in use and it looked as if it would soon rain, Reid did not check the number on the frame at that time. However, when he inspected the frame number later, he determined that that

number there was V.I.N. 4708. In his testimony at trial, Reid said that his investigation led him to the following conclusions: The Corvette that Alford had bought from Mobile Dodge was in fact made up of two different Corvettes. The frame and related parts belonged to a Corvette with V.I.N. 4708. The large amount of rust in that part of the automobile indicated that the Corvette with V.I.N. 4708 had been under water at one time. This fact would make the automobile a "salvage vehicle," and Reid reported that conclusion to the Department of Revenue. Reid also discovered that the Corvette with V.I.N. 4708 had been stolen during transit.

Reid testified that the engine, transmission, serial plate, and possibly the left door belonged to a Corvette with V.I.N. 9392. The record shows that the Corvette with V.I.N. 9392 had been wrecked in Texas on or before October 19, 1981, in a "relatively severe" front end collision. Alford introduced pictorial evidence of this wreck, to which Mobile Dodge objected.

Although V.I.N. 9392 was found only on the engine, transmission, and left door pillar post of the Corvette, Alford was given a bill of sale to a Corvette with that number.

The title history of the Corvette with V.I.N. 9392 is as follows: The automobile was owned by Robert Michael at the time it was wrecked in Texas on or before November 19, 1981. After the wreck, the Corvette was taken to a Houston, Texas, repair shop. The Corvette was never repaired; it was transferred to Houston Salvage Pool, a pool dealing in wrecked and "totalled" automobiles.

On December 8, 1981, the State of Texas issued a salvage certificate of title to Farmer's Insurance Group of Houston, Texas. This insurance company obtained title when it paid Robert Michael for his claim on the Corvette. Later that same month, Farmer's Insurance Group sold the Corvette to H & H Motors. On July 4, 1982, H & H

Motors sold the Corvette to Frank W. Allison, who, on September 26, 1982, traded the Corvette to Mobile Dodge as a down payment on a new truck.

The history of the Corvette with V.I.N. 4708 is unknown between the time it was stolen and the time its vehicle identification number was found on the Corvette in question.

Bertha Dunlap, title and lien examiner of the Motor Vehicle Division, Alabama Department of Revenue, testified as follows:

Frank Allison filed an application for an Alabama certificate of title for the Corvette on August 16, 1982. The Department of Revenue received this document on August 20, 1982. On that same day, August 20, a salvage certificate of title on the Corvette with V.I.N. 9392 was received by the Department of Revenue. That salvage certificate of title indicated Frank Allison's ownership of the Corvette. All of these documents were sent to the salvage unit of the Motor Vehicle Division of the Department. From August 25, 1982, to November 2, 1982, when title was issued, the file on Corvette V.I.N. 9392 was in suspense in the salvage unit of the Motor Vehicle Division.

Charles Patton, the supervisor of the salvage unit, sent the request to John Reid to inspect the Corvette. This request was dated September 30, 1982. The request indicated that the Corvette was located at Mobile Dodge. The Department of Revenue would have known the location of the Corvette only by inquiry from Mobile Dodge. This inquiry was made before September 30, the date of the sale to Alford. Any such inquiry from Mobile Dodge would have been immediately transferred to the salvage unit.

Kenneth Shereck, sales manager at Mobile Dodge on September 30, 1982, testified as follows:

He had spent twenty years in the automobile business and was an expert on Corvettes. In his career, he had bought and sold between 500 an 600 Corvettes, had owned many Corvettes personally, and was familiar with 1978 model Corvettes.

Part of Shereck's job was to approve used automobiles and to manage the "Used Car Department" of the dealership. When Allison brought the Corvette to Mobile Dodge, Shereck examined the Corvette in detail. He noticed the Corvette had been repainted and he admitted that this put him on notice that it could have been wrecked. He discovered paint overspray in various parts of the automobile. He wondered whether the Corvette had been under water at some time because the automobile had a musty smell. He found numerous other defects in the automobile.

Shereck recorded the results of his appraisal on an appraisal slip, on which he wrote "W" for "wholesale," to indicate that it was his recommendation that the Corvette not be sold to the public, but at auction.

Shereck told the owner of Mobile Dodge that he felt the Corvette should be sold at wholesale. However, the owner told Shereck to "clean up [the Corvette] and retail it." Four days later, the Corvette was sold to the plaintiff Alford.

Alford filed an action against Mobile Dodge, alleging various misrepresentations. At the end of all the evidence, Mobile Dodge moved for a directed verdict. This motion was denied. The jury returned a verdict in favor of Alford in the amount of $125,000. Mobile Dodge filed a motion for judgment notwithstanding the verdict, or in the alternative, for new trial and/or remittitur. This motion was also denied. Judgment was entered and this appeal followed.

Mobile Dodge presents four issues for our review:

I. Whether there was sufficient evidence to support the verdict regarding the alleged misrepresentations by Mobile Dodge as to title;

II. Whether the trial court erred when it admitted into evidence documents relating to the salvage title of the Corvette with V.I.N. 9392 and photographs of that Corvette in a wrecked condition;

III. Whether the trial court erred in its statement to the jury regarding the law of punitive damages;

IV. Whether the damages awarded by the jury were excessive and against the weight of the evidence.

I

One of the counts which went to the jury alleged as follows:

> "At the time of the negotiations for the sale of the 1978 Chevrolet Corvette the Defendant represented to the Plaintiff that the Defendant had good title to the Corvette and could and would transfer good title to the Plaintiff. Said representations by the Defendant were willful misrepresentations of material facts under Section 6-5-103 *Code of Alabama 1975* which were relied upon by the Plaintiff in purchasing the Corvette and fraudulent deceit upon the Plaintiff. The Plaintiff alleges that the Defendant at the time of the representations did not have good title to the Corvette."

Mobile Dodge contends that there was insufficient evidence to show that Mobile Dodge knew or should have known that it did not have good title to the Corvette. Since Mobile Dodge moved for a directed verdict as to this count at the end of all the evidence, specifically calling attention to the lack of evidence, and filed a motion for

a judgment notwithstanding the verdict, or in the alternative for a new trial, if there is no evidence to support this count, the verdict must be set aside, even though there was sufficient evidence to support the other misrepresentations count. *John Deere Industrial Equipment Co. v. Keller*, 431 So. 2d 1155 (Ala. 1983).[1]

The scintilla rule is the standard of evidence rule which this Court must apply. The question is whether there is any evidence or logical inference which can be drawn therefrom to support the jury verdict as to the count alleging willful misrepresentation of good title. *Allstate v. Alexander*, [MS. 84-637, December 12, 1985] ___ So. 2d _ (Ala. 1985). It is our view that there is evidence in the record to support a finding that Mobile Dodge knew or should have known that it did not have good title to the Corvette, and that it misrepresented that it could transfer good title. The jury could have found the following from the evidence: Mobile Dodge inquired of the salvage unit of the Motor Vehicle Division of the Department of Revenue as to the state of title to the Corvette before the automobile was sold to Alford. It was routine for Mobile Dodge to make such inquiries whenever a trade-in was brought to its lot by one who had no title, certificate or who, like Frank Allison, was making application for title. Shereck Gleason, finance manager for Mobile Dodge at the time of the sale of the Corvette to Alford, certified the

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[1]

> "[I]f a complaint has more than one count and the defendant believes that the evidence is not sufficient to support one or more of those counts, he must challenge this by motion for directed verdict, specifying the count which is not supported by the evidence and detailing with specificity the grounds upon which the particular count is not supported by the evidence. If this is not done and all counts go to the jury and a general verdict is returned, the court will presume that the verdict was returned on a valid count."

Aspinwall v. Gowens, 405 So. 2d 134, 138 (Ala. 1981).

title application filed by Alford. Gleason signed the following statement found on that application:

> "I hereby certify that the above described vehicle has been physically inspected by me and that the V.I.N. and descriptive data on this application are correct . . . ."

We cannot say the trial court was in error when it denied Mobile Dodge's motions for directed verdict and for J.N.O.V.

Mobile Dodge contends that even if the allegations that it misrepresented that it could transfer good title are true, Alford was not damaged because he received an Alabama certificate of title on the Corvette on February 2, 1983. However, this certificate of title was based on information obtained by John Reid during an initial investigation in which he checked only the three locations on the Corvette where V.I.N. 9392 was found and failed to check the frame number. On a subsequent inspection, he found that the number on the frame was different from the other three numbers.

It has been held that a certificate of title to an automobile is only prima facie evidence of ownership and can be contradicted by other evidence. *City Car Sales, Inc. v. McAlpin*, 380 So. 2d 865 (Ala. Civ. App. 1979), *cert. denied*, 38[illegible] So. 2d 869 (Ala. 1980). Furthermore, Code 1975, 32-8-49, provides that the Department of Revenue can suspend or revoke a certificate of title if it was fraudulently procured or erroneously issued. Therefore, Alford's title to the Corvette is in serious jeopardy, and thus he has been damaged by the fraudulent conduct of Mobile Dodge. Moreover, Mobile Dodge's contention in this regard is inconsistent with its contention in the second issue presented for review. In the second issue, it contends that the Corvette's true V.I.N. was 4708, which is not the vehicle identification number of the vehicle to which a certificate of title was issued to Alford, namely V.I.N. 9392. Likewise,

V.I.N. 4708 is a stolen vehicle and Mobile Dodge could never transfer good title to a stolen vehicle. *State Farm Mutual Automobile Insurance Co. v. Wagnon*, 53 Ala. App. 712, 304 So. 2d 216, (Ala. Civ. App. 1974).

II

Mobile Dodge next contends that the trial court erred when it admitted into evidence over objection documents relating to the salvage title of the Corvette with V.I.N. 9392 and photographs of that Corvette in a wrecked condition. Mobile Dodge argues that the Corvette's true V.I.N. was 4708 and, therefore, that the above evidence was misleading and prejudicial.

Rulings as to the admissibility of evidence will not be disturbed on appeal in the absence of a gross abuse of discretion. *Russellville Flower Craft, Inc. v. Searcy*, 452 So. 2d 478 (Ala. 1984).

The photographs of the Corvette in its wrecked condition were relevant to show the damages sustained by Alford from the fraud. The salvage documents were relevant to the issues relating to title, and to the question of whether the Corvette should have been held out for sale to the public. The trial court did not abuse its discretion when it admitted this evidence.

III

Mobile Dodge next asserts that the trial court erred in its statement to the jury regarding the law of punitive damages. The trial court charged the jury as follows:

> "In addition to actual or compensatory damages, the law authorizes a jury to award punitive damages in fraud and deceit actions if it is shown to the reasonable satisfaction of the jury by the evidence that the fraud or the deceit was malicious, oppressive or gross or a misrepresentation

> made with knowledge of its falseness or so recklessly done as to amount to the same thing and committed with the intent to injure and to defraud.
>
> "If you are reasonably satisfied from the evidence that the defendant was guilty of a fraud or deceit as charged by the plaintiff and that such fraud or deceit was malicious, oppressive or gross and made with the intent to injure and defraud the plaintiff and the plaintiff did suffer damage as a proximate result of such fraud or deceit, then in your discretion you may award the plaintiff punitive damages in addition to any actual damage you find from the evidence the plaintiff did suffer."

Mobile Dodge argues that punitive damages should be allowed only under "exceptional and extraordinary circumstances clearly indicating aggravated, malicious or spiteful conduct" (quoting from Chief Justice Torbert's dissenting opinion in *Winn-Dixie Montgomery, Inc. v. Henderson*, 395 So. 2d 475 (Ala. 1981)). If this were the standard for the imposition of punitive damages in Alabama, the trial court would not be in error, because its instructions included the phrase "malicious, oppressive or gross" in addition to the requirement of intent to deceive. However, the fact that the law requires only an intent to deceive or defraud for the imposition of punitive damages, *American Honda Motor Co. v. Boyd*, 475 So. 2d 835 (Ala. 1985), does not place the trial court in error insofar as the defendant Mobile Dodge is concerned.

IV

Last, Mobile Dodge contends that the damages awarded by the jury were excessive and against the weight of the evidence. It asks this Court to grant a remittitur.

This Court has held that a remittitur or a new trial should not be ordered on the grounds of excessiveness of the jury's verdict except in those cases where the Court can see that the verdict has been reached on account of bias, passion, prejudice, corruption, or other improper motive. *Vest v. Gay*, 275 Ala. 286, 154 So. 2d 297 (1963); *Airheart v. Green*, 267 Ala. 689, 104 So. 2d 687 (1958). In short, a remittitur or a new trial should be ordered on the ground of excessiveness where there is an improperly functioning jury.

This Court will not disturb the trial court's ruling on the damages issue unless this Court finds the trial court's decision to be a "plain and palpable" error. *Vest v. Gay*, *supra*.

This Court has upheld verdicts with punitive damages awards in fraud and misrepresentation cases in excess of the award in the present case. *National Security Fire & Casualty Co. v. Bowen*, 447 So. 2d 133 (Ala. 1983) ($1,500,000); *Shiloh Construction Co. v. Mercury Construction Corp.*, 392 So. 2d 809 (Ala. 1980) ($559,966.61); *National States Insurance Co. v. Jones*, 393 So. 2d 1361 (Ala. 1980) ($500,000); *Alabama Farm Bureau Mutual Casualty Insurance Co. v. Griffin*, [MS. 84-452, January 17, 1986] ___ So. 2d ___ (Ala. 1986) ($276,368) (Torbert, C. J., and Adams and Houston, JJ., dissenting on the issue of remittitur).

We look first to the enormity of the wrong. Alford was sold an automobile consisting of parts from two separate automobiles. One of these automobiles had been stolen, thus placing Alford's ownership of the present automobile into question. The other automobile had been wrecked and salvaged in Texas. The present automobile is encrusted with rust, probably a result of its having been subjected to water damage. The extent of the true damage to the present automobile is unknown. What is known in that Alford, the passengers and guests in this Corvette, and

the general public using the public streets and highways and the sidewalks abutting the same were subjected to a substantial risk of bodily harm and even death by the sale of the seriously defective vehicle by Mobile Dodge to Alford with representations that it was in excellent condition and had never been wrecked. See *Treadwell Ford, Inc. v. Campbell*, 485 So. 2d 312 (Ala. 1986).

Although this was a general verdict and we do not know what portion of the award would relate to compensatory damages, due to the enormity of the wrong in this case, we would affirm an award of $125,000 solely as punitive damages.

AFFIRMED.

Torbert, C. J., Faulkner, Almon, and Beatty, JJ., concur.

APPENDIX B

MAILING ADDRESS: TELEPHONE: 261-4609

P.O. Box 157
Montgomery, Alabama 36101

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 84-1006

MOBILE DODGE, INC., a Corp. (Appellant) vs. DANNY R. ALFORD (Appellee)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

___ Appeal docketed. Future correspondence should refer to the above number.

___ Court Reporter granted additional time to file reporter's transcript to and including

___ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

___ Appell ___ granted 7 additional days to file briefs to and including

___ Record on Appeal filed

___ Appendix Filed

___ Submitted on Briefs

___ Petition for Writ of Certiorari denied. No opinion.

xx-xxx Application for rehearing overruled. No opinion written on rehearing. Houston, J.—Torbert, CJ., Maddox, Almon & Beatty, JJ., concur.

—— Permission to file amicus curiae briefs granted ——

4/25/86

/s/ ROBERT G. ESDALE
ROBERT G. ESDALE, CLERK
Supreme Court of Alabama

APPENDIX C

February 14, 1986

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA

84-1006

MOBILE DODGE, INC., a Corporation
v.

DANNY R. ALFORD

MOBILE CIRCUIT COURT
#CV 83-000109

This cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the circuit court be affirmed.

IT IS FURTHER ORDERED AND ADJUDGED that the appellant, Mobile Dodge, Inc., a Corporation, and Allied Fidelity Insurance Company, surety on the supersedeas bond, pay the amount of the judgment of the circuit court plus ten percent damages and interest and the costs of appeal as provided by the Alabama Rules of Appellate Procedure, for which let execution issue.

OPINION BY HOUSTON, J.

TORBERT, CJ., FAULKNER, ALMON AND BEATTY, JJ., CONCUR.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of

the instrument(s) herewith set out as same appear(s) of record in said Court. Witness my hand this 13 day of May 1986.

/s/ ROBERT G. ESDALE
ROBERT G. ESDALE
Clerk, Supreme Court of Alabama

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF ALABAMA

S.C. 84-1006

MOBILE DOGE, INC., a corporation,
Appellant, Defendant,

vs.

DANNY R. ALFORD,
Appellee/Plaintiff.

FILED
JULY 18, 1986
CLERK
Supreme Court of Alabama

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Mobile Dodge, Inc., the Appellant above named, hereby appeals to the Supreme Court of the United States from:

(a) The final decision of the Supreme Court of Alabama of February 14, 1986, affirming the judgment of the Circuit Court of Mobile County against Appellant, and the order of the Supreme Court of Alabama dated May 13, 1986 entering final judgment against Appellant and imposing on Appellant the ten (10%) percent penalty prescribed by Section 12-22-72, Code of Alabama (1975); and

(b) The final order issued by the Supreme Court of Alabama overruling Appellant's Application for Rehearing entered on April 25, 1986.

This Appeal is taken pursuant to 28 U.S.C. Section 1257(2).

ENGEL, WALSH and ZOGHBY
Attorneys for Appellant
Post Office Box 1045
Mobile, Alabama 36633

By: /s/ MYLAN R. ENGEL
MYLAN R. ENGEL

By: /s/ ALEX W. ZOGHBY
ALEX W. ZOGHBY

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have on this the 18th day of July, 1986 served a copy of the foregoing on the Honorable Charles Graddick, Attorney General, and Vincent F. Kilborn, Attorney at Law, counsel for all parties concerned, by mailing the same by United States mail, properly addressed and first class postage prepaid.

/s/ ALEX W. ZOGHBY
ALEX W. ZOGHBY

Supreme Court, U.S.
FILED
AUG 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-107

In The

Supreme Court of the United States

October Term, 1986

MOBILE DODGE, INC.,

Appellant,

v.

DANNY R. ALFORD,

Appellee.

On Appeal From The Supreme Court Of Alabama

MOTION TO DISMISS

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QUESTION PRESENTED

Whether federal claims which were not presented to the Supreme Court of Alabama until an application for rehearing, which were not presented in accordance with established State practice, and were not sought to be reviewed, were not timely or properly raised, and were not expressly passed on by that Court, are within this Court's jurisdiction.

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No. 86-107

In The

Supreme Court of the United States

October Term, 1986

MOBILE DODGE, INC.,

Appellant,

v.

DANNY R. ALFORD,

Appellee.

On Appeal From The Supreme Court
Of Alabama

MOTION TO DISMISS

Pursuant to Rule 16.1(b) of the Rules of the Supreme Court of the United States, Appellee Danny R. Alford (herein referred to as "Alford") moves to dismiss this appeal on the ground that the federal questions sought to be reviewed were not timely or properly raised, and were not expressly passed on under Rule 16.1(b).

STATEMENT OF THE CASE

On February 14, 1986, in an exhaustive and well reasoned Opinion the Supreme Court of Alabama unanimously affirmed the Judgement of the Circuit Court of

Mobile County, Alabama pursuant to a jury verdict in the amount of $125,000.00 in favor of Alford and against the Appellant Mobile Dodge, Inc., (herein referred to as "Mobile Dodge"). Up until that time Mobile Dodge had never expressly or impliedly raised the constitutional issues which it raises upon this appeal. Mobile Dodge had not raised these issues in its Motion to Dismiss any Causes of Action of the Complaint, it had not raised such issues in its Motion for Directed Verdict at the close of Alford's case in chief or at the close of all of the evidence, it had not raised such issues in its post-trial Motion for Judgement Notwithstanding the Verdict, or in the Alternative, For New Trial and/or Remittitur as required by Rule 59 Ala. R. Civ. P. and most importantly it had not presented such issues in its "Statement of Issues Presented for Review" on its appeal to the Supreme Court of Alabama as required by Rule 28(a)(3) of the Alabama Rules of Appellate Procedure. Jurisdictional Statement 6a-7a. Appendix A, p. App. 1.

The first and only time Mobile Dodge attempted to raise the unconstitutionality of Section 12-22-72, *Code of Alabama 1975*, automatically imposing a penalty of ten percent on any money Judgement upon an unsuccessful Defendant-Appellee under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and the validity of the punitive damage award under the Excessive Fines Clause of the Eighth Amendment of the Constitution of the United States was in Mobile Dodge's Application for Rehearing to the Supreme Court of Alabama under Rule 40 of the Alabama Rules of Appellate Procedure.

Under Rule 44 of the Alabama Rules of Appellate Procedure, it is required that if the validity of any statute is raised in an Appellate Court of the State of Alabama and the governmental body which enacted the statute is not a party to the proceeding the party raising such questions shall serve a copy of his written brief on the Attorney General of the State of Alabama clearly setting out the questions raised. Appendix B, p. App. 2. Rule 44(b) requires that "A certificate of service shall be included in the brief of the party raising such question". Rule 44(d) states:

> [t]he appellate court will not rule until the notice contemplated by this rule has been given to the appropriate governmental body ....

Mobile Dodge's Brief served upon counsel for Alford and as filed with the Supreme Court of Alabama did not contain the required certificate of service upon the Attorney General of the State of Alabama in violation of Rule 44. After this appeal was filed with this Court and by letter dated August 4, 1986 counsel for Mobile Dodge for the first time served upon counsel for Alford a second certificate of service purportedly filed and received by the Attorney General of Alabama. Appendix C, p. App. 3, 4, 5 and 6. Appendix D, App. p. 7 and 8 is a copy of the only certificate of service served upon Alford or filed in the Supreme Court of Alabama before this appeal. The record will reflect that the brief of Mobile Dodge filed with the Alabama Supreme Court on Application for Rehearing did not contain this second certificate of service upon the Attorney General of Alabama. Alford raised the failure of Mobile Dodge to serve a copy of its Application for Rehearing upon the Attorney General of the State of Alabama as required by Rule 44 of the Alabama

Rules of Appellate Procedure in its Reply Brief to Mobile Dodge's Application for Rehearing. The Alabama Supreme Court had no knowledge of and no way to know of Mobile Dodge's apparent delivery of its Application for Rehearing to the Attorney General. The Supreme Court of Alabama would not rule upon the constitutionality of Section 12-22-72 *Code of Alabama 1975* under Rule 44(d) since the proper notice was not shown by the record to have been given to the Attorney General of Alabama. A copy of the first page and the portion of page 17 of Alford's Brief in Reply to the Application for Rehearing pointing this fatal procedural defect out to the Supreme Court of Alabama is included in Appendix E, p. App. 8.

Mobile Dodge's Application for Rehearing was overruled without either federal question being properly raised and without either being "expressly passed on" by the Supreme Court of Alabama as required by Rule 16.1(b) of the Rules of the Supreme Court of the United States. Jurisdictional Statement 14a-15a.

A. FACTS RELEVANT TO THE CONSTITUTIONAL QUESTIONS PRESENTED.

Mobile Dodge, in its Jurisdictional Statement at page 4, has set forth facts which it alleges are relevant to the constitutional questions presented. These are not the facts as set out in the Opinion of the Alabama Supreme Court. The correct facts are fully outlined in the Supreme Court of Alabama's Opinion at 487 So.2d 866 (Ala. 1986). Jurisdictional Statement 1a-13a. A brief synopsis of the facts is as follows.

The 1978 Chevrolet Corvette sold by Mobile Dodge to Alford was represented to Alford as having not been

wrecked and being in excellent condition. The Corvette was in fact two separate automobiles pieced together to make one. One automobile, sometimes referred to as VIN 4708, had been stolen while in transit from Louisville, Kentucky, and the other automobile, VIN 9392, had been totalled in Texas and sold for salvage. The condition of the Corvette sold to Alford was so bad that the Alabama Supreme Court referred to it as subjecting Alford, the passengers and guests in the Corvette, and the general public to "substantial risks of bodily harm and even death". Jurisdictional Statement 13a. Mobile Dodge not only knew that the Corvette had a Texas Salvage Title but that the Corvette was really two automobiles put together to make one. The Corvette also had serious rust problems which indicated that it had been under water. The Corvette was examined by Mobile Dodge prior to its sale to Alford by Kenneth Shereck, a Corvette expert employed by Mobile Dodge. Shereck had repaired and resold twenty damaged Corvettes himself. Shereck made a detailed physical examination of the Corvette when it was brought to Mobile Dodge by the previous owner Allison. Shereck saw that the Corvette had been repainted and in fact asked Allison had the Corvette been "in serious trouble" and had it ever had any "body work" done. Shereck noticed the Corvette had overspray on it which indicated it had been repainted and noticed a musty smell, evidence of the Corvette being under water. An incorrect brake pedal on the Corvette was obvious on examination and indicated the transmission was incorrect and "something was wrong". Shereck decided in his own mind to wholesale the car in order "to avoid lawsuits" and because he had decided that the Corvette was a "dog". Over Shereck's objection Morey Hider, the owner of Mobile Dodge, or-

dered Shereck to clean up the Corvette and retail it to the public rather than selling it at wholesale. The salesman, George Gonzales, described the car as "a piece of trash" that "you don't sell to the public . . . ." Gonzales described a wholesale car as a "piece of junk". Both Gonzales and Shereck, agents of Mobile Dodge, knew that different VIN numbers on the Corvette meant that it had been wrecked and that somebody had rebuilt the car. Four days after Hider ordered Shereck to clean up the Corvette and retail it to the public it was sold to Alford. Prior to Alford's purchase, Mobile Dodge had called the Alabama Department of Revenue Salvage Unit to find out about Allison's Title and thus knew of Allison's Salvage Title.

Contrary to Mobile Dodge's Statement of Facts in its Jurisdictional Statement at page 5, Alford never got Title to the Corvette. After this suit was filed and on February 2, 1983, Alford received a Certificate of Title to VIN 9392. However, most of what Alford physically received was from the stolen VIN 4708 and as pointed out by the Alabama Supreme Court one cannot receive a good title to a stolen vehicle. Jurisdictional Statement 9a-10a. The utterly gross conduct of Mobile Dodge is further sufficiently and succinctly detailed in the Alabama Supreme Court's Opinion set forth in the Appendix to the Jurisdictional Statement 1a-15a.

———o———

ARGUMENT

1. THE FEDERAL ISSUES WERE NEITHER PROPERLY PRESENTED TO NOR CONSIDERED BY THE SUPREME COURT OF ALABAMA.

This Court has laid down the general rule that "[q]uestions first presented to the highest State court on a petition for rehearing come too late for consideration" here. *Radio Station WOW, Inc., v. Johnson,* 326 U.S. 120, 128 (1945); 16 C. Wright, A Miller, E. Cooper & E. Gressman, Federal Practice and Procedure, § 4022 at 701 (1977).

The Alabama appellate courts are firmly committed to the rule that new questions may not be presented to them for the first time on rehearing. In *Kirkland v. Kirkland,* 281 Ala. 42, 198 So.2d 771, 777 (1967), the Supreme Court of Alabama held:

> We cannot sanction the practice of bringing up new questions for the first time in application for rehearing. *Robinson v. Allison,* 97 Ala. 596, 604, 12 So. 382, 604 [sic].
>
> An application for rehearing on ground not argued or suggested until after our judgment was rendered cannot now be considered.

In *Lovett v. Uptain,* 450 So.2d 113, 116 (Ala. Civ. App. 1983), *aff'd sub nom. Ex parte Lovett,* 450 So.2d 116, 118 (Ala. 1984), the court stated:

> After an opinion has been rendered by an appellate court, consideration may not be given on rehearing to issues which were not argued nor suggested upon the initial submission of the case.

See, *Green v. First National Bank of Tuscaloosa,* 49 Ala. App. 426, 272 So.2d 895, 901 (1971), *rev'd on other*

grounds, 290 Ala. 14, 272 So.2d 901 (1972); *Alabama Farm Bureau Mutual Casualty Insurance Co. v. Anderson*, 48 Ala. App. 172, 263 So.2d 149 (1972), *cert. denied*, 288 Ala. 538, 263 So.2d 155 (1972); *Putnam v. City of Huntsville*, 48 Ala. App. 33, 261 So.2d 754 (1972). This rule is but an extension of the general Alabama rule against raising new issues for the first time on appeal. In *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n. 3 (1983), this Court noted that "[t]he general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal."[1]

The Supreme Court of Alabama has specifically refused to hear arguments upon new *constitutional* issues raised for the first time on rehearing. See *Cooper v. State*, 226 Ala. 288, 147 So. 432 (1933); *State v. City of Birmingham*, 160 Ala. 196, 48 So. 843 (1909).[2]

---

1. In *Orr v. Orr*, 440 U.S. 268 (1979), a constitutional claim was first presented on appeal, but was considered by the Supreme Court of Alabama without objection. At 440 U.S. 274, this Court noted:

> "This unexcused tardiness might well have constituted a procedural default under state law, and if Alabama had refused to hear [the] constitutional objection on that ground, we might have been without jurisdiction to consider it here."

This Court emphasized that its conclusion did not "preclude any other state, or even Alabama in another case," from concluding that the constitutional argument made in *Orr*, raised in the same manner, would be too late to be considered. *Id.* at 275, n. 4.

2. At page 8 of its jurisdictional statement, Mobile Dodge argues that there is some significance to the fact that the Alabama Supreme Court in this case *overruled* its application for rehearing, instead of *denying* the application. Overruling applications for rehearing upon grounds that a constitutional issue was first raised on rehearing is not inconsistent with Alabama's practice. See e.g., *Cooper v. State*, 226 Ala. 288, 147 So. 432 (1933).

In construing Section 25 of the Judiciary Act of 1789, the predecessor of 28 U.S.C. § 1257, Justice Story wrote:

> It has been uniformly held that to give this court jurisdiction, two things should have occurred and be apparent in the record: First, that some one of the questions stated in the section did arise in the court below; and second, that a decision was actually made thereon by the same court . . . .

Crowell v. Randell, 35 U.S. (10 Pet.) 368, 390 (1836). Where the highest state court does not address a federal question, this Court assumes that the omission was caused by the lack of proper presentation. *Exxon Corp. v. Eagerton, supra,* 462 U.S. at 181 n. 3. And even if a state court passes on some questions raised on rehearing, federal questions also then raised but not passed upon may not be presented in this Court. *Fullerton v. Texas,* 196 U.S. 192 (1905).

In *Cardinale v. State of Louisiana,* 394 U.S. 437 (1969) this Court stated the rule:

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v. Randell,* 10 Pet. 368, 9 L.Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee,* 5 *Cranch* 344, 3 L.Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c.20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391, 9 L.Ed. 458, 467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion, 394 U.S. 438.

The Court explained its rationale:

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds.

With regard to first raising federal questions upon an application for rehearing, this Court has rejected such arguments in *Herndon v. Georgia*, 395 U.S. 441 (1934). There this Court held that it was without jurisdiction because "no federal question was seasonably raised in the court below or passed upon by that court". This Court rejected jurisdiction even though it noted that there was a,

> [p]reliminary attack upon the indictment in the trial court on the ground, among others, that the statute was in violation 'of the Constitution of the United States,' and that this contention was overruled.

See, 295 U.S. 441, 443.

However, this Court stated at 295 U.S. 443,

> But, in addition to the insufficiency of the specification, the adverse action of the trial court was not preserved by exceptions *pendente lite* or assigned as error in due time in the bill of exceptions, as the settled rules of the state practice require.

With reference to the attempt to raise the federal question after Judgment upon a petition for rehearing, this Court held that, unless the lower court actually entertains *and decides* the question. it is raised too late.

This Court stated at 295 U.S. 443,

> The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing. comes too late, unless the court actually entertains the question and decides it.

Mobile Dodge's reference in its Jurisdictional Statement at pages 10 and 11 to the existence of one phrase appearing on page 49 of a 52 page brief making a passing reference to "the resemblance of punitive damages to criminal sanctions" is even less of a challenge than the preliminary attack on the indictment held insufficient by this Court in *Herndon v. Georgia, supra.*

Mobile Dodge recognizes in its Jurisdictional Statement at page 7, that it bears a heavy burden to persuade this Court of its jurisdiction in the admitted absence of any express reference in the Opinion of the court below to the federal constitutional provisions relied upon by Mobile Dodge here. Mobile Dodge cites for this proposition this Court's decision is *Illinois v. Gates,* 472 U.S. 213 (1983).

As noted by this Court in *Gates, supra,* which quoted from this Court's decision in *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430 (1940), at page 434, this burden is extremely heavy.

> But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is *only in exceptional cases*, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below . . . . In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court. (Emphasis added.)

This Court in *Gates, supra,* noted that there are very good reasons for this Court's rule. At 462 U.S. 213, 221, the Court noted one reason as follows:

> [q]uestions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind.

A second important reason, the notion of "comity" or a proper respect for the functions of state judicial institutions, was noted by this Court in *Gates, supra,* at page 221:

> Likewise, 'due regard for the appropriate relationship of this Court to state courts,' citing case, ... demands that those courts be given an opportunity to consider the constitutionality of the actions of state

> officials, and, equally important, proposed changes in existing remedies for unconstitutional actions.

Lastly, the Court in *Gates, supra,* noted at 462 U.S. 213, 224 that, "weighty prudential considerations" militate against considering questions not previously passed upon by state courts. Describing this last consideration the Court in *Gates* stated,

> Where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion. By doing so we 'promote respect . . . for the Court's adjudicatory process [and] the stability of [our] decisions.' *Mapp v. Ohio, supra,* 367 U.S., at 677, 6 L.Ed.2d 1081, 81 S.Ct. 1684, 16 Ohio Ops. 2d 384, 86 Ohio L. Abs. 513, 84 ALR.2d 933 (Harlan, J., dissenting). Moreover, fidelity to the rule guarantees that a factual record will be available to us, thereby discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances. In Justice Harlan's words, adherence to the rule lessens the threat of "untoward practical ramifications," id., at 676, 6 L.Ed.2d 1081, 81 S.Ct. 1684, 16 Ohio Ops. 2d 384, 86 Ohio L. Abs. 513, 84 ALR.2d 933 (dissenting opinion), not foreseen at the time of decision. The public importance of our decisions in Weeks and Mapp and the emotions engendered by the debate surrounding these decisions counsel that we meticulously observe our customary procedural rules. By following this course, we promote respect for the procedures by which our decisions are rendered, as well as confidence in the stability of prior decisions. A wise exercise of the powers confided in this Court dictates that we reserve for another day the question whether the exclusionary rule should be modified.

Mobile Dodge's failure to raise either federal question presented in the Jurisdictional Statement at any point

during these proceedings until its Application for Rehearing violates Rule 16.1(b) of the Rules of the Supreme Court requiring that federal questions be both timely and properly raised in the court below and expressly passed on by the court below. Here, neither condition is met. Even if this Court should decide that the raising of such issues in Mobile Dodge's Application for Rehearing was a timely and proper method of raising such issues in the Supreme Court of Alabama, such issues were not expressly passed upon by the Supreme Court of Alabama and this Court's jurisdiction must fail for that reason alone. *Herndon v. Georgia, supra* at page 10.

Mobile Dodge chose all of the issues to be decided by the Supreme Court of Alabama in its appeal. These issues are set forth by the Alabama Supreme Court in its opinion. Jurisdictional Statement page 7a. Whether the failure of Mobile Dodge to present the federal questions is due to neglect or some other reason is irrelevant. No excuse whatsoever is even offered by Mobile Dodge for its failure to present to the Supreme Court of Alabama Question 2 pertaining to the Excess Fines Clause of the Eighth Amendment. As will be seen below, Question 1 pertaining to the mandatory ten percent affirmance should have been but was not presented to the Supreme Court of Alabama in Mobile Dodge's initial appeal to that court.

A. THE CONSTITUTIONALITY OF SECTION 12-22-72 WAS NOT TIMELY AND PROPERLY RAISED.

Mobile Dodge asserts, at pages 7, 8 and 9 of its Jurisdictional Statement, that waiting until the decision was against it and then filing an Application for Rehearing

was the "logical time" to present a challenge to the non-discretionary imposition by the court of the ten percent penalty. If, as is admitted by Mobile Dodge, the ten percent penalty is non-discretionary, Mobile Dodge knew beforehand that in the event its appeal was lost that the non-discretionary penalty would be imposed. Thus, Mobile Dodge's excuse for waiting until after it lost the appeal to raise the non-discretionary imposition of the ten percent penalty is not logical. This is unlike *Burlington Northern Railroad Company v. Woods*, 768 F.2d 1287 (11th Cir. 1985) No. 85-1088 (*cert. granted* March 24, 1986) where a post-judgment motion for assessment penalty was filed and granted by the Eleventh Circuit.

Mobile Dodge asserts that since its Application for Rehearing was "overruled" rather than "denied" that this means that the Alabama Supreme Court "implicitly" upheld the constitutionality of Sectnon 12-22-72 thereto and that their action was "presumptively" not based upon lack of proper presentation of the question. These statements by Mobile Dodge are strictly speculation as to the meaning of the words "denied" versus "overruled" to the Alabama Supreme Court. Neither *Ham v. Harrington*, 278 Ala. 521, 179 So.2d 154 (1965), *cert. denied*, 382 U.S. 981 (1966), nor *Thompson v. State*, 268 Ala. 483, 107 So.2d 890 (1959) cited as authority by Mobile Dodge had anything to do with this proposition. Mobile Dodge's Application for Rehearing was overruled without opinion. Such action does not rise to the level of the court having "passed upon" the issue for the purposes of this rule. As this Court stated in *Illinois v. Gates, supra*, "the routine restatement and application of settled law by an appellate court [does] not satisfy the 'not pressed or passed upon

below' rule." 462 U.S. at 222-23 (citing *Morrison v. Watson*, 154 U.S. 111 (1894).[3]

In fact, if one were to engage in speculation as Mobile Dodge does in its Jurisdictional Statement, one would speculate that overruling Mobile Dodge's Application for Rehearing could presumptively be because of lack of proper presentation. Rule 44(a) of the Alabama Rules of Appellate Procedure specifically mandates that when any state statute is challenged because of its alleged unconstitutionality "the party raising such question [Mobile Dodge] shall serve a copy of his written brief, which shall clearly set out the question raised, on the Attorney General . . . ." Rule 44(b) further states, "A certificate of service [on the Attorney General] shall be included in *the brief* of the party raising such question." (Emphasis added.) In this case, Mobile Dodge did not include in its filed certificate of service the fact that it had served the Attorney General of the State of Alabama. The Supreme Court of Alabama would naturally conclude by looking at the filed Application for Rehearing that Rule 44 was not complied with due to Mobile Dodge's failure to serve the Attorney General with a copy of the Application for Rehearing. In fact, this fatal defect in Mobile Dodge's Applica-

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3. Mobile Dodge's challenge to Section 12-22-72 is raised in a manner indistinguishable from the challenge to the same statute raised by petitioner in *Illinois Central Gulf Railroad Co. v. Evan D. Coleman*, No. 85-695 (*cert. denied* May 5, 1986) where this Court denied the Petition for Writ of Certiorari in the face of a Supreme Court of Alabama decision which did not address the merits of a constitutional challenge to Section 12-22-72. This Court necessarily recognized the logic and practice of denying challenges to the constitutionality of Section 12-22-72 which were not properly and timely raised and passed upon by the Alabama Supreme Court.

tion for Rehearing to the Supreme Court of Alabama was pointed out by Alford in his Reply Brief to the Application for Rehearing. Appendix E, p. App. 8. Mobile Dodge apparently has tried to correct its fatal error by letter to counsel for Alford dated August 4, 1986 enclosing for the first time a second certificate of service allegedly served upon the Attorney General of Alabama. Appendix C, p. App. 3, 4, 5 and 6. Regardless of whether or not as the letter asserts Mobile Dodge did in fact serve a copy of the Application for Rehearing on the Attorney General, the Alabama Supreme Court would not have known of this fact since this second certificate of service was never filed with the court. Thus, the logical conclusion would be that the Alabama Supreme Court agreed, as pointed out by Alford, that Rule 44 had been violated by Mobile Dodge's failure to serve the Application for Rehearing upon the Attorney General, and thus under its Rule 44(d) it could not procedurally hear the constitutional issue raised by the Application for Rehearing. On these facts one could thus presume that the Alabama Supreme Court overruled the Application for Rehearing because of Mobile Dodge's failure to comply with Rule 44.

From the above it is clear that Mobile Dodge did not timely or properly raise the federal questions presented here for review and it is clear that they were not expressly passed on as required by Rule 16.1(b).

B. THE FEDERAL CONSTITUTIONAL CHALLENGE TO THE EXCESSIVENESS OF THE PUNITIVE DAMAGE AWARD WAS NOT TIMELY OR PROPERLY RAISED.

Mobile Dodge contends that the alleged excessiveness of the punitive damage award was first challenged on No-

vember 23, 1983 in its post-trial Motion for Judgment Notwithstanding the Verdict, or in the Alternative, For New Trial and/or Remittitur.[4] A review of the Motion expressly shows that no constitutional challenge whatsoever was presented in the Motion, no mention was made of the Excessive Fines Clause of the Eighth Amendment, no mention was made of the Due Process Clause of the Fourteenth Amendment, and no mention was made of the Equal Protection Clause of the Fourteenth Amendment. Neither was Question 2 raised in any manner whatsoever in Mobile Dodge's brief filed with the Supreme Court of Alabama on its direct appeal June 14, 1984. The only four issues chosen to be raised by Mobile Dodge in its appeal were those issues stated in the Opinion of the Supreme Court of Alabama. Jurisdictional Statement 7a. Like the Motion for Judgement Notwithstanding the Verdict, or in the Alternative, For a New Trial and/or Remittitur, Mobile Dodge's brief did not present any constitutional challenge whatsoever to the imposition of punitive damages. Mobile Dodge's contention in its initial brief was that the *amount* of punitive damages was "excessive", not that the award of punitive damages would be unconstitutional. Mobile Dodge admits in their Jurisdictional Statement at page 11, that "for the first time" Mobile Dodge relied upon the Excessive Fines Clause of the Eighth Amendment of the Due Process Clause of the Fourteenth Amendment in its Application for Rehearing. This admission in the Jurisdictional Statement alone would justify a

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4. Mobile Dodge's Motion in this regard has been lodged with the Clerk of this Court in connection with the docketing of this appeal as per Mobile Dodge's footnote 5, Jurisdictional Statement page 10.

granting of this Motion to Dismiss. *Herndon v. Georgia*, 295 U.S. 441 (1935).

By no stretch of the imagination could one consider the constitutional issues raised in the Application for Rehearing as an "enlargement" of any previous challenge made by Mobile Dodge. *Dewey v. Des Moines*, 173 U.S. 193 (1899) cited by Mobile Dodge as authority for the "enlargement of previous challenges" principle supports Alford's position here. In *Dewey*, the only constitutional question raised by the appellant in the court below in brief was that he had "no personal notice or knowledge of the assessment proceedings" and "the imposition of a personal liability against him in excess of the value of all lots was not due process of law, and was in contravention of the provisions upon that subject of the Fourteenth Amendment of the Constitution of the United States". In addition to this question Dewey attempted to raise in this Court that taxation of lots above their actual value constituted a taking of private property for public use without just compensation and without due process of law. This Court held that the second question could not be raised in this Court because it had not been previously raised in the Supreme Court of Iowa. This Court noted that the appellee made the same objection as Alford does here stating,

> It is objected on the part of the Defendant in error that, as this is a review of a judgment of a state court, this second question cannot be raised here, because it was not raised in the courts below and was not decided by either of them.
>
> Reference to the opinion of the Supreme Court of the State shows that it was not therein discussed or decided.

See, 173 U.S. 197.

It should be observed that even though the Due Process Clause was relevant to both questions attempted to be raised in this Court by Dewey that the second question was held not to be an "enlargement" of the first question. It is important that this Court referred to the "opinion" of the Supreme Court of Iowa to determine that the federal question attempted to be raised in this Court was "not therein discussed or decided."

This Court's rule is soundly based upon the principle that the lower state courts should be given a reasonable and adequate opportunity to first pass upon the merits of a constitutional challenge based upon a sufficient record and presentation of meaningful arguments. In no way can it be claimed by Mobile Dodge that the Alabama Supreme Court was ever given any kind of reasonable presentation of a record or argument on Question 2 in Mobile Dodge's appeal and, therefore, there is nothing upon which an "enlargement" argument can be based.

It has not been the practice of this Court throughout its history to formulate a record and decide issues for an appellant who wishes that it had properly raised issues in the courts below and then tries to get this Court to accept jurisdiction based upon issues inadequately presented below. The reason for Rule 16.1(b) is to give state courts a legitimate and ample opportunity to pass upon "expressly" raised federal issues. Rule 16 of the Rules of the Supreme Court and *Illinois v. Gates*, 462, U.S. 213 (1983). As pointed out previously there are sound judicial reasons for this rule. Not the least of these reasons is to allow the lower courts to formulate a proper record for a clear decision upon the issue. For instance, if the court below were called upon to decide the constitutional issues raised herein

it would be required to determine the exact amount of punitive damages versus the actual amount of compensatory damages. As the Alabama Supreme Court pointed out in its Opinion (Jurisdictional Statement 13a) "although this was a general verdict and *we do not know* what portion of the award would relate to compensatory damages, due to the enormity of the wrong in this case, we would affirm an award of $125,000.00 solely as punitive damages." (Emphasis added.) The Supreme Court of Alabama has already stated that it does not know the amount of the verdict related to punitive damages and it should not be called upon by this Court to do something which it has already said it is unable to do. Had Mobile Dodge pressed this point from the beginning of this case there would be a clear record as to what damages were compensatory and what damages were punitive. Because of Mobile Dodge's neglect the record is unclear on this point. Even Mobile Dodge speculates in its Jurisdictional Statement at page 18 upon the amount of punitive damages.

This Court has previously passed upon the issue presented here in an appeal attempted under 28 U.S.C. Section 1257(c) in *Exxon Corp. v. Eagerton,* 462 U.S. 176 (1983). There the appellant attempted to contend that the application of the pass-through prohibition to oil was preempted by the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. Section 1751. This Court concluded that it had no jurisdiction to consider the contention. This Court clearly set out the jurisdictional rule in footnote 3 of the opinion. 462 U.S. 176, 181. As here, the opinion of the Alabama Supreme Court did not discuss or consider the issue presented. This Court stated at 462 U.S. 181 with regard thereto as follows,

> The decision below does not discuss this issue, and when " 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " *Fuller v. Oregon,* 417 U.S. 40, 50, n. 11, 40 L.Ed.2d 642, 94 S.Ct. 2116 (1974), quoting *Street v. New York,* 394 U.S. 576, 582, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969). No such showing has been made here. Although appellants in No. 81-1268 have represented to this Court that the trial court held the pass-through prohibition to be preempted by the EPAA, Juris Statement at 3, an examination of the trial court opinion reveals that in fact the court made no mention of the EPAA. Nor does anything in the record before us indicate that this issue was raised in the trial court. Appellants did address the EPAA in their brief before the Supreme Court of Alabama, Brief for Appellees Exchange Oil and Gas Corp., Getty Oil Co., Placid Oil Co., Union Oil Co. of California in No. 79-823, pp 51-53, but that court did not pass on the issue. Under these circumstances we have no jurisdiction to consider whether the EPAA preempted the application of the pass-through prohibition to oil, for it does not affirmatively appear that that issue was decided below. *Bailey v. Anderson,* 326 U.S. 203, 206-207, 90 L.Ed. 3, 66 S.Ct. 66 (1945). The general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal.

Thus, this Court has already considered and consrtued Alabama's practice with regard to constitutional challenges raised for the first time on appeal. The rule that this Court has applied to Alabama decisions as stated in *Exxon Corp. v. Eagerton, supra,* is that jurisdiction will not be accepted under 28 U.S.C. 1257(2) if the Alabama Supreme Court has not been presented with and the ques

tion has not been expressly passed upon. Not only is this good law it is good sense.

Mobile Dodge has offered absolutely no excuse for not raising the constitutional issues in the trial court and as this Court observed in *Exxon Corp. v. Eagerton, supra,* the general practice of the Alabama appellate courts is not to consider issues raised for the first time on appeal. Although Mobile Dodge attempts to boot strap its Eighth Amendment and Due Process claims by asserting that it generally challenged the punitive damages award as excessive in its post trial motion and upon original submission on appeal, it candidly admits in its Jurisdictional Statement that those constitutional issues were "for the first time, expressly relied on" in its Application for Rehearing. Jurisdictional Statement page 11. Mobile Dodge likewise offers no excuse for not raising the Eighth Amendment and Due Process questions upon its original appeal to the Alabama Supreme Court.[5]

It is obvious from the way that Mobile Dodge handled the trial of this case, as well as its appeal to the Supreme Court of Alabama, that Mobile Dodge failed to present any constitutional questions until the Application for Rehearing. By that time the Alabama Supreme Court had completely, capably, and exhaustively dealt with all the issues raised by Mobile Dodge in its appeal to that court. The constitutional issues raised upon the Application for Rehearing were simply an afterthought which came to Mobile Dodge's attention at a later time.

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5. No claim of "surprise" under the doctrine of *Brinkerhoff-Faris Trust and Savings Co. v. Hill,* 281 U.S. 673 (1930) is suggested.

Hathorn v. Lovorn, 457 U.S. 255 (1982) and like cases to the contrary, notwithstanding, principles of sound judicial economy and comity, not to mention sound plain logic, compel a conclusion that this Court should refrain from reviewing federal issues which are belatedly and halfheartedly addressed to the state courts as an afterthought in violation of the established rules of those courts. This Court has fully and completely recognized this principle several times. In *Webb v. Webb*, 451 U.S. 493, 499 (1981), it said:

> It is appropriate to emphasize again . . . that there are powerful policy considerations underlying the statutory requirement and our own rule that the federal challenge to a state statute or other official act be presented first to the state courts. These considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue as been properly raised below.
>
> In the first place, although the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law. Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law, or, if the litigation is wholly private, construing and applying the applicable federal requirements.

Even if it is assumed that this Court has jurisdiction of this appeal as to the constitutionality of Section 12-22-72 (Question 1), it is clear that it does not have jurisdiction to decide the constitutional issues relating to the excessiveness of the punitive damage award and the Eighth Amendment (Question 2). *Dewey v. Des Moines, supra.*

———o———

CONCLUSION

This Court stated in *Aetna Life Ins. Co. v. Lavoie,* op. at 14, 106 S.Ct., at 1589 that the issues raised on this appeal were important issues "which, in an appropriate setting, must be resolved . . . ." It is submitted that the "appropriate setting" has not been presented by Mobile Dodge. This failure is illustrated by a similar case, *Illinois Central Gulf Railroad Co. v. Evan D. Coleman,* No. 85-695, in which the petition for certiorari was denied May 5, 1986. The constitutional issues Mobile Dodge attempts to present to this Court were never raised in the trial court and were never raised before the Supreme Court of Alabama until the Application for Rehearing. Rule 16.1(b) has been violated because the federal questions sought to be reviewed were not timely or properly raised and were not expressly passed on by the Alabama Supreme Court. Thus, the Motion to Dismiss this appeal should be granted.

Respectfully submitted,

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Attorney for Appellee

APPENDIX A

Alabama Rules of Appellate Procedure.

RULE 28

BRIEFS

(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

* * *

(3) A statement of the issues presented for review with principal authorities of law supporting each issue presented;

APPENDIX B

Rules of Appellate Procedure

RULE 44

CONSTITUTIONAL QUESTIONS

(a) Service. If the validity of any statute, executive or administrative order, municipal ordinance, franchise or written directive of any governmental officer, agent or body is raised in the appellate court, and the State, municipal corporation or governmental body which enacted or promulgated such questioned order is not a party to the proceeding, the party raising such question shall serve a copy of his written brief, which shall clearly set out the question raised, on the Attorney General, the city attorney, or the chief legal officer of the governmental body whose order is questioned.

(b) Certificate of Service. A certificate of service shall be included in the brief of the party raising such question.

* * *

(d) Notice. Except by special order of the court, in the absence of such notice and certificate, the appellate court will not rule until the notice contemplated by this rule has been given to the appropriate governmental body and the said governmental body or chief legal officer has been given such opportunity to respond as shall be set by the court

APPENDIX C

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August 4, 1986

Vincent F. Kilborn, III, Esquire
Attorney at Law
Post Office Box 1904
Mobile, Alabama 36633

Re: Mobile Dodge, Inc.

vs

Danny R. Alford

Dear Vince:

As you know, Rule 44 of the Alabama Rules of Appellate Procedure requires that the office of the Attorney General be notified when any State statute is constitutionally challenged in a court of law. Rule 44 (b) requires that a certificate of service shall be included in the brief of the party raising such such constitutional challenge. Our Brief in Support of our Application for Rehearing to the Alabama Supreme Court contained such a challenge and, accordingly, I have enclosed a copy of the front page of such Brief as well as both pages of certificate of

service; one to you and the other notifying the Honorable Charles D. Graddick, Attorney General for the State of Alabama of our challenge by the filing of our Brief. You will note that the Office of the Attorney General certified that the Brief was received by the Office of the Attorney General on March 8th, 1986.

With best regards,

ENGEL, WALSH and ZOGHBY

/s/ Alex W. Zoghby

AWZ:tas

enclosure

cc: Mr. Morris Hider

Larry L. Sims, Esquire

IN THE SUPREME COURT OF ALABAMA

Case No. 84-1006

MOBILE DODGE, INC.,
a corporation,

Appellant,

vs.

DANNY R. ALFORD,

Appellee

APPEALED FROM THE JUDICIAL COURT FOR THE THIRTEENTH JUDICIAL COURT (MOBILE CIRCUIT COURT)

BRIEF OF MOBILE DODGE, INC., APPELLANT, IN SUPPORT OF ITS APPLICATION FOR REHEARING

ORAL ARGUMENT REQUESTED

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/s/ Mylan R. Engel

/s/ Alex W. Zoghby

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have on this the 7th day of March, 1986, served a copy of the foregoing on counsel for all parties concerned by mailing

the same by United States mail, properly addressed and first class postage prepaid.

/s/ Alex W. Zoghby

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have on this the 7th day of March, 1986, served a copy of the foregoing Brief of Mobile Dodge, Inc., Appellant, in Support of its Application for Rehearing on the Honorable Charles D. Graddick, Attorney General for the State of Alabama, by mailing the same by United States mail, properly addressed and first class postage prepair.

/s/ Alex W. Zoghby

July 30, 1986

I hereby certify that the above brief was received by the Office of the Attorney General on March 8, 1986.

/s/ Thomas R. Allison
Assistant Attorney General

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

Case No. 84-1006

MOBILE DODGE, INC.,
a corporation,

Appellant,

vs

DANNY R. ALFORD,

Appellee.

APPEALED FROM THE JUDICIAL COURT FOR THE THIRTEENTH JUDICIAL COURT (MOBILE CIRCUIT COURT)

BRIEF OF MOBILE DODGE, INC., APPELLANT, IN SUPPORT OF ITS APPLICATION FOR REHEARING

ORAL ARGUMENT REQUESTED

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/s/ Alex W. Zoghby

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have on this the 7th day of March, 1986, served a copy of the foregoing on counsel for all parties concerned by mailing the same by United States mail, properly addressed and first class postage prepaid.

/s/ Alex W. Zoghby

APPENDIX E

IN THE SUPREME COURT OF ALABAMA

CASE NO. S.S. 84-1006

MOBILE DODGE, INC.,

Appellant,

vs.

DANNY R. ALFORD,

Appellee.

BRIEF OF APPELLEE IN OPPOSITION TO APPELLANT'S APPLICATION FOR REHEARING

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ISSUE IV

EQUAL PROTECTION ARGUMENT

Mobile Dodge finally argues at Section 12-22-72, imposing a ten percent (10%) affirmance penalty violates the Equal Protection Clause. As stated before, this issue was never raised during the trial of this case nor during this appeal. Under the cases previously cited this Court should not consider new issues raised upon an Application for Rehearing.

It should also be noted that where constitutional questions are raised involving the validity of a state statute Rule 44 of the Rules of Appellate Procedure must be followed. This rule includes notice provisions to the Attorney Geuneral of the State of Alabama. None of the requirements of Rule 44 have been met in this case.

Supreme Court, U.S.
FILED
SEP 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MOBILE DODGE, INC.,

Appellant,

v.

DANNY R. ALFORD,

Appellee.

On Appeal From The Supreme Court Of Alabama

REPLY MEMORANDUM

---

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REPLY MEMORANDUM

In his Motion to Dismiss ("Motion"), appellee virtually concedes that the weight of authority brought to this Court's attention in appellant's Jurisdictional Statement ("Juris. Stat.") regarding the actual practice of the Supreme Court of Alabama of entertaining questions raised for the first time in an application for rehearing conclusively establishes this Court's jurisdiction over this case. Thus, appellee argues, Motion, at 24, that "notwithstanding" this Court's decisions in *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982), "and like cases to the contrary," this Court has no jurisdiction over this case. But as appellant has previously demonstrated, Juris. Stat., at 7-15 & nn. 3, 7 & 8, the practice of the court below is so well established that appellee may prevail on his jurisdictional arguments only if *Hathorn* and many other cases in this Court are overruled. This reply memorandum will therefore be limited to responding to appellee's few arguments which attempt to distinguish this case from the situation presented in *Hathorn*.

A. The Practice of the Supreme Court of Alabama Regarding Questions Presented for the First Time in an Application for Rehearing

Appellee attempts, Motion, at 7-8, to establish that the Supreme Court of Alabama does not entertain questions raised for the first time in an application for rehearing by reliance on two cases in that court, *Kirkland* v. *Kirkland*, 281 Ala. 42, 198 So.2d 771 (1967), and *Lovett* v. *Uptain*, 450 So.2d 113 (Ala. Civ. App. 1983), *aff'd sub nom. Ex parte Lovett*, 450 So.2d 116 (Ala. 1984), which, as appellant pointed out, Juris. Stat., at 12, are merely exemplars of cases in which the court below occasionally states that it will not decide questions "improperly" pre-

sented but proceeds to decide those questions after indicating that they were improperly presented.

Appellee also cites, Motion, at 8, three cases in support of its jurisdictional argument which were decided not by the court below but by Alabama's intermediate appellate court. At issue here, however, is not the practice of Alabama's intermediate appellate court but the actual practice of the Supreme Court of Alabama. Finally, appellee, Motion, at 8, cites in support of his argument two cases decided more than a half-century ago. Those two cases do not, however, establish that the court below "strictly or regularly" refuses to decide questions raised for the first time in an application for rehearing.[1]

B. Service of Appellant's Brief in Support of Its Application for Rehearing on the Attorney General of Alabama

Appellee, Motion, at 3, 16-17, speculates that the court below could have overruled appellant's application for rehearing because of appellant's asserted failure to comply with Rule 44, Ala. R. App. P. Under that rule, a party challenging the validity of a state statute "shall serve a copy of his written brief . . . on the Attorney General [of Alabama]." This rule was complied with by appellant, as demonstrated by the certificate of service reprinted in the appendix to appellee's Motion, at App. 6. Indeed, the Assistant Attorney General of Alabama has certified that appellant's brief was received by the Office of the Attorney

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[1] One of those two cases, *Cooper* v. *State*, 226 Ala. 288, 147 So. 432 (1933), is itself flatly contrary to an earlier decision, *Gibbons* v. *Gibbons*, 205 Ala. 636, 88 So. 833 (1921), which it did not purport to overrule. The other case relied on by appellee, *State ex rel. Sigsbee* v. *City of Birmingham*, 160 Ala. 196, 48 So. 843 (1908), is itself contrary to a case in the court below decided two and one-half months later. *State ex rel. Tubbs* v. *White*, 160 Ala. 168, 174, 49 So. 78, 81 (1909).

General on March 8, 1986, one day after it had been served on the Attorney General and appellee. *Id.*[2]

On close inspection, appellee's argument is that because the certificate of service filed with appellant's brief in support of its application for rehearing used the word "parties" and because the separate certificate of service expressly naming the Attorney General of Alabama was not attached to that brief, the court below was not aware of appellant's actual compliance with Rule 44 and *could* have assumed non-compliance by appellant. Appellee does not, of course, cite to any case in which the court below has held actual non-compliance with Rule 44—failure to serve a brief on the Attorney General—as being a bar to its consideration of questions covered by Rule 44. Appellee's argument that the court below might have refused to entertain appellant's challenge to § 12-22-72 notwithstanding that the Attorney General was served as required by Rule 44 is nothing more than far-fetched speculation founded on the disingenuity of appellee in characterizing documents which appellee has himself put before this Court.[3]

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[2] Appellee, Motion, at 17, appears to attempt to impugn the integrity of appellant's counsel in the court below and the integrity of the Assistant Attorney General of Alabama by reference to the certificate of service "allegedly served upon the Attorney General of Alabama" and the statement "whether or not" the application for rehearing was served on the Attorney General. For that reason, a copy of this Reply Memorandum is being served on the Attorney General of Alabama for any response which the Office of the Attorney General may deem appropriate.

[3] As is obvious from Rule 44, which has as its counterpart Rule 28.4(c) of the Rules of this Court, the purpose of requiring service on the Attorney General is to ensure that that official has the opportunity to present a defense of a challenged statute. As this Court is well aware, the Attorney General of Alabama has previously demonstrated a profound disinterest in defending § 12-22-72 in this Court, having failed to do so at the jurisdictional and merits stages in *Aetna Life Ins. Co.* v. *Lavoie*, No. 84-1601 (Apr. 22, 1986), 106 S.Ct. 1580 (1986), and *Burlington Northern R. Co.* v. *Woods*, No. 85-1088 (*cert. granted* Mar. 24, 1986).

C. Appellee's Reliance on this Court's Denial of Certiorari in *Illinois Central Gulf R. Co.* v. *Coleman*

Appellee, Motion at 16 & 25, relies on this Court's denial of certiorari in *Illinois Central Gulf R. Co.* v. *Coleman*, No. 85-695 (*cert. denied* May 5, 1986), for the proposition that appellant's challenge to § 12-22-72 in its brief in support of its application for rehearing was untimely. In *Illinois Central*, the petitioner presented to this Court a facial challenge to § 12-22-72 which was identical to the challenges to § 12-22-72 in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (Apr. 22, 1986), 106 S. Ct. 1580 (1986), and in this appeal. *See* Pet. for Cert. of Illinois Central Gulf R. Co., at i & 4-5.

This Court, after apparently holding that petition pending its decision in *Aetna*, denied the petition on May 5, 1986. If, as appellee asserts, Motion, at 16 n.3, appellant had raised its challenge to § 12-22-72 in the court below "in a manner indistinguishable from the challenge to the same statute raised by petitioner in *Illinois Central*," appellee's reliance on this Court's denial of certiorari in *Illinois Central* might be of some assistance to appellee even though a denial of certiorari—in contrast to the dismissal of an appeal for want of jurisdiction—cannot be interpreted as a statement by this Court respecting its jurisdiction over a case.

In fact, and as this Court is aware, the challenge to § 12-22-72 presented to this Court by the petitioner in *Illinois Central* had never been presented to the Supreme Court of Alabama. *See* Brief of Respondent Coleman in Opposition to Petition for a Writ of Certiorari to the Supreme Court of Alabama, at 4-5.[4]

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[4] It is noteworthy that from the time respondent Coleman's categorical assertions regarding the failure of the petitioner to present its challenge to § 12-22-72 to the Supreme Court of Alabama were filed with this Court on November 25, 1985 until this Court's denial of certiorari on May 5, 1986, no reply to the respondent's assertions was filed by the petitioner.

Thus, contrary to appellee's submission, this case is not like *Illinois Central*, but is instead in essentially the same jurisdictional posture in this Court as *Treadwell Ford, Inc.* v. *Campbell*, No. 85-1799 (appeal docketed May 7, 1986), and other cases on this Court's docket which raise challenges to the appeal penalty statues of Alabama or Mississippi as well as to excessive punitive damage awards. *See* Juris. Stat., at 22-23 n.13. This appeal should, therefore, be acted upon in a manner consistent with the appeal in *Treadwell*.[5]

Respectfully submitted,

September 15, 1986

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[5] Appellee, Motion, at 20-21, also argues that the record in this case does not adequately present the Excessive Fines Clause issue because the court below did not determine how much of the total $125,000 judgment constituted punitive damages. However, appellant's Excessive Fines Clause argument can be, as pointed out in its Juris. Stat., at 18-19 n.11, decided by this Court on the basis of the lowest possible figure which could be attributed to punitive damages based on appellee's own submissions to the court below. Thus, appellee's argument on this point is misplaced.